FILE COPY.

Supreme Court, U.S.
FILED

97 1734 APR 2 2 1998

OFFICE OF THE CLERK

No. 97 –

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

STICHTING PENSIOENFONDS VOOR DE GEZONDHEID, GEESTELIJKE EN MAATSCHAPPELIJKE BELANGEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR A WRIT OF CERTIORARI

K. Peter Schmidt
Counsel of Record
Philip W. Horton
James P. Joseph
ARNOLD & PORTER
555 12th Street, N.W.
Washington, D.C. 20004
(202) 942-5000
Counsel for Petitioner

80 pp

QUESTIONS PRESENTED

1. Was the substantive issue here -- whether a jointly-administered multiemployer pension plan like Petitioner is a "labor organization" exempt from U.S. income taxation under section 501(c)(5) of the Internal Revenue Code ("Code") -- correctly decided in the affirmative by the United States Court of Appeals for the Second Circuit in *Morganbesser v. United States,* 984 F.2d 560 (2d Cir. 1993), or in the negative by the United States Court of Appeals for the District of Columbia Circuit in this case?

2. Alternatively, were Petitioner considered not to be tax exempt under Code section 501(c)(5), is Petitioner entitled to be treated as exempt by virtue of (i) favorable 501(c)(5) determinations by the Internal Revenue Service ("IRS") in the case of similarly-situated plans and (ii) U.S. treaty obligations, and Code section 7805(b) which gives the IRS authority to limit the retroactivity of its rulings?

PARTIES TO THE PROCEEDING

All the parties are named in the caption of the case.

STATEMENT PURSUANT TO RULE 29.6

There are no parent or subsidiary companies to be listed under the provisions of Rule 29.6.

TABLE OF CONTENTS

OPINIONS BELOW 2

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. The Fund's Purpose, Formation and Activities 3

B. The Fund's Efforts with the IRS 4

C. Proceedings Below 5

REASONS FOR GRANTING THE PETITION 6

I. The Second Circuit Is Right; a Fund Like Petitioner Meets the Statutory, Regulatory, Judicial and Publicly Promulgated Administrative Definitions for a Labor Organization Exempt from Tax Under Code Section 501(c)(5) 7

A. The Code and Regulations 7

B. Administrative and Judicial Authority Confirms that the 501(c)(5) Exemption Covers Entities Other than Unions 9

C. The Fund Meets the Requirements for 501(c)(5) Exemption and Should Be Recognized as Exempt 11

D. The Analytic Approach of the Second Circuit Was Correct 13

1. Relevance of GCMs 13

2. Unambiguous Entitlement 14

II. The Lower Court Attempted to Resolve an Important Issue of Federal Law, But Adopted an Interpretative Position That Is Both Untenable and Demonstratively Unworkable. 16

A. The Lower Court's Test is Not Viable. 16

B. The Court Misread Relevant Authority. 19

1. Conjunctive or Disjunctive Regulatory Criteria 20

a. General principles of construction 20

b. Existing 501(c)(5) authority 21

c. Common sense 22

2. Improper Distinctions Between Foreign and Domestic Entities and "On-The-Job" and "After-The-Job" Benefits Under Section 501(c)(5) 24

III. The Health Workers Fund Is Entitled to a Refund Because the IRS Has Concurrently Treated Other, Similarly Situated Foreign Pension Funds as Tax-Exempt. 25

A. The Government Must Treat Similarly Situated Taxpayers in the Same Manner. 26

B. The Health Workers Fund Is Entitled to the Same Treatment as the Merchant Navy Plans. 28

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Baker v. Commissioner, 787 F.2d 637 (D.C. Cir. 1986) 25

Baker v. United States, 748 F.2d 1465 (11th Cir. 1984) 26

Bouchard v. *Crystal Coin Shop*, 843 F.2d 10 (1st Cir. 1988) 13

Bruce v. First Fed. Sav. and Loan Assn., 837 F.2d 712 (5th Cir. 1988) 21

Chock Full O'Nuts Corp. v. United States, 453 F.2d 300 (2d Cir. 1971) 26

Corn Prods. Ref. Co. v. Commissioner, 350 U.S. 46 (1955) 13

Dunn v. United States, 468 F. Supp. 991 (S.D.N.Y. 1979) 26

Farmers & Merchants Bank v. United States, 476 F.2d 406 (4th Cir. 1973) 26

Herrmann v. E.W. Wylie Corp., 766 F. Supp. 800 (D.N.D. 1991) 13

Idaho First Nat'l Bank v. Commissioner, 997 F.2d 1285 (9th Cir. 1993) 13

International Bus. Machs. Corp. v. United States, 343 F.2d 914 (Ct. Cl. 1965) 6, 26-29

Morganbesser v. United States, 984 F.2d 560 (2d Cir. 1993) ..... passim

National League of Postmasters v. Commissioner, 86 F.3d 59 (4th Cir. 1996) 22

Peacock v. Lubbock Compress Co., 252 F.2d 892 (5th Cir. 1958) 21

Portland Co-operative Labor Temple Assn v. Commissioner, 39 B.T.A. 450 (1939), *acq.*, 1939-1 C.B. 28 ..... 10, 11, 18

Stichting Pensioenfonds Voor de Gezondheid, Geestelijke en Maatschappelijke Belangen v. United States, 950 F. Supp. 373 (D.D.C. 1996) ..... passim

Stichting Pensioenfonds Voor de Gezondheid, Geestelijke en Maatschappelijke Belangen v. United States, 129 F.3d 195 (D.C. Cir. 1997) ..... passim

Trotter v. Tennessee, 290 U.S. 354 (1933) 15

Tupper v. United States, 134 F.3d 444 (1st Cir. 1998) 6

United States v. Fisk, 70 U.S. 445 (1865) 21

United States v. Kaiser, 363 U.S. 299 (1960) 27

United States v. Stewart, 311 U.S. 60 (1940) 15

United States v. Stowe-Woodward, 306 F.2d 678 (1st Cir. 1962) 13

United States v. Wells Fargo Bank, 485 U.S. 351 (1988) 14

United States v. Wisconsin Power and Light Co., 38 F.3d 329 (7th Cir. 1994) 13

Wagner v. United States, 387 F.2d 966 (Ct. Cl. 1967) 26

Yazoo & Miss. Valley R.R. Co. v. Thomas, 132 U.S. 174 (1889) 15

STATUTES

I.R.C. §501(c)(5) ..... passim

I.R.C. §7805(b) ..... passim

28 U.S.C. §1254(1) 2

28 U.S.C. §1331 5

28 U.S.C. § 1346(a)(1) 5

28 U.S.C.§2101(c) 2

REGULATIONS

Treas. Reg. §1.501(c)(5)-1(a) 8, 20

TREASURY DETERMINATIONS

Gen. Couns. Mem. 34623 (Sept. 24, 1971) 28

Gen. Couns. Mem. 34634 (Oct. 8, 1971) 17

Gen. Couns. Mem. 35790 (Apr. 23, 1974) 17

Gen. Couns. Mem. 35862 (June 20, 1974) 17

Gen. Couns. Mem. 37424 (Feb. 22, 1978)..... 17

Gen. Couns. Mem. 37726 (Oct. 20, 1978)..... 17

Gen. Couns. Mem. 37942 (Apr. 27, 1979)..... 10, 12

Gen. Couns. Mem. 38981 (Jan. 26, 1983) 9, 17

Rev. Rul. 59-6, 1959-1 C.B. 121 ..... 17, 19, 22

Rev. Rul. 62-17, 1962-1 C.B. 87 ..... 17, 22, 25

Rev. Rul. 66-177, 1966-1 C.B. 132 24

Rev. Rul. 67-7, 1967-1 C.B. 137 ..... 10, 17, 22

Rev. Rul. 68-534, 1968-2 C.B. 217 17

Rev. Rul. 74-167, 1974-1 C.B. 134 22

Rev. Rul. 74-596, 1974-2 C.B. 167 ..... 17, 22

Rev. Rul. 75-288, 1975-2 C.B. 212 ..... 17, 22

Rev. Rul. 75-473, 1975-2 C.B. 213 ..... 10, 11, 17, 19, 22

Rev. Rul. 76-31, 1976-1 C.B. 157 ..... 17, 22

Rev. Rul. 77-5, 1977-1 C.B. 146 ..... 17, 22

Rev. Rul. 77-154, 1977-1 C.B. 148 ..... 17, 22

Rev. Rul. 78-42, 1978-1 C.B. 158 ..... 17, 22

MISCELLANEOUS

A. DeRoode, *Pensions as Wages* 3 Am. Econ. Rev. 287 (1913) 25

Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, U.S.-Neth., art. 28(1), S. Treaty Doc. No. 103-6 (1993) 24

James B. Kennedy, *Beneficiary Features of American Trade Unions* 100-03 (1908) 8-9

John Mitchell, *Organized Labor* 104 (1903) 8

Murray Latimer, *Trade Union Pension Systems* 12-26 (1932) 9

1A Norman J. Singer, *Statutes and Statutory Constructions* § 21.14 (5th ed. 1993) 21

Teresa Ghilarducci, *Labor's Capital: The Economics and Politics of Private Pensions* 26 (1992) 8

Treaty of Friendship, Commerce and Navigation, Dec. 5, 1957, U.S.-Neth., art XI, para. 3, 8 U.S.T. 2043 29

U.S. Department of Labor, *Brief History of the American Labor Movement* 1 (1957) 8

U.S. Department of Labor, *National Union Benefit Plans 1947-1967* 8

No. 97 –

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

STICHTING PENSIOENFONDS VOOR DE GEZONDHEID, GEESTELIJKE EN MAATSCHAPPELIJKE BELANGEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

Stichting Pensioenfonds voor de Gezondheid, Geestelijke en Maatschappelijke Belangen respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the District of Columbia Circuit is reported at 129 F.3d 195 and is set forth in its entirety in the Appendix at A-1 to –12. (All "A-___" references are to pages of the Appendix.) The opinion of the United States District Court for the District of Columbia, affirmed by the court of appeals, is reported at 950 F. Supp. 373 and is set forth in its entirety in the Appendix at A-13 to -33.

JURISDICTION

The decision below was originally issued by the Court of Appeals for the District of Columbia Circuit on November 14, 1997. A-1. On December 23, 1997, Stichting Pensioenfonds voor de Gezondheid, Geestelijke en Maatschappelijke Belangen petitioned for a rehearing and suggestion for rehearing en banc. On January 23, 1998, the District of Columbia Circuit denied the petition for rehearing. A-34. In accordance with 28 U.S.C. § 2101(c), this Petition is filed within ninety days of the date the petition for rehearing was denied. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of the Internal Revenue Code of 1986 (26 U.S.C.), as amended and in effect during the year in issue (hereinafter referred to as the "Code"), as well as the relevant Treasury Regulations and treaty provisions are set forth in the Appendix A-35 to -38.

STATEMENT OF THE CASE

Petitioner Stichting Pensioenfonds voor de Gezondheid, Geestelijke en Maatschappelijke Belangen (the "Fund" or "Health Workers Fund"), is a Dutch

multiemployer pension fund seeking refund of the 1993 U.S. income taxes it paid on the grounds that it is a labor organization exempt from such taxes under Code section 501(c)(5). The rejection of the Fund's position by the court below is in direct conflict with *Morganbesser v. United States*, 984 F.2d 560 (2d Cir. 1993), a decision of another circuit. At least twenty other cases presenting this issue are currently pending in the lower courts. Moreover, the lower court's holding establishes an untenable interpretation of section 501(c)(5) generally, potentially affecting many other types of tax-exempt labor organizations.

A. The Fund's Purpose, Formation and Activities

The Fund is a Dutch not-for-profit entity (a "stichting") exempt from income taxes under Dutch law. It was formed in 1969 as a result of negotiations between the Dutch national hospital employers' association (the "National Hospital Association") on the one hand, and the three principal labor unions representing workers in the hospital industry on the other. A-2, -14. At the time the Fund was organized, the National Hospital Association and the three unions adopted the Fund's articles of association, which established overall control of the Fund by a "Bestuur" or Board of Directors ("Board"). A-2-3, -14. Under Dutch law, participation in the Health Fund is mandatory for workers in certain Dutch health and social welfare industry sectors. A-2. By 1993, participants and beneficiaries in the Fund totaled approximately one million individuals, making the Fund the second largest pension fund in Holland. A-3.[1]

---

[1] The Fund is funded through contributions from both employers and employees. During 1993, 40% of all contributions were made by employers and 60% by employees. A-3.

As required by Dutch law[2], the Fund's Board has, at all relevant times, been composed 50% of representatives appointed by the labor unions involved and 50% of representatives appointed by industry employer associations. A-2-3, -15. The Board has ultimate responsibility for administration and management of the Fund and its assets. In addition, the Board actually negotiates the terms and conditions of many pension-related employment issues, including not only benefit levels and improvements, but also the level of required pension contributions for employers and employees. These representational activities -- conducted within the structure of the Fund itself -- sometimes have a direct effect on employment conditions as fundamental as wage levels.

B. The Fund's Efforts with the IRS

The Fund originally sought confirmation from the IRS of its tax-exempt status in December, 1992, when it filed an Application for Recognition of Exemption from Federal Income Tax (the "Exemption Application"). The IRS has never acted on the Fund's Exemption Application.

In 1989, prior to the Fund's filing of its Exemption Application, the IRS issued favorable determination letters to two British multiemployer pension funds, MNOPF Trustees Limited and Merchant Navy Ratings Pension Fund Trustees Limited (the "Merchant Navy Plans") confirming that such plans are "labor organizations" exempt from U.S. income taxes under Code section 501(c)(5). Like the Health Workers Fund, these plans were established as a result of collective bargaining, are administered by boards consisting

---

[2] The Fund is subject to the Dutch Pension and Savings Fund Act of 1952, as amended, and is subject to regulation by the Dutch Insurance Chamber. At no time has the Fund been subject to regulation under the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

of equal numbers of union and employer representatives, are funded by contributions from both employers and employees, and exist to provide pension benefits to their members, who are all workers from a defined segment of their respective country's economy (in the British case, the British Merchant Marine).[3]

C. Proceedings Below

On June 8, 1994, the Fund filed a claim for refund of U.S. income taxes paid for the taxable year 1993. The taxes at issue had been withheld from dividends paid on U.S. securities owned by or on behalf of the Fund. A-3. The IRS did not act on this claim, and, after six months, the Fund filed suit in the United States District Court for the District of Columbia for the recovery of taxes alleged to have been erroneously collected. *Id.*; *see also* 28 U.S.C. §§ 1331, 1346(a)(1) (conferring jurisdiction over the Fund's refund action on the district court).

On cross-motions for summary judgment, the district court rejected the Second Circuit's conclusion in *Morganbesser*, and held in favor of the government, concluding that the Fund was not a tax-exempt labor organization under Code section 501(c)(5), and was not entitled to be treated as though it were under Code section 7805(b). A-21-27, -31-32.

The court of appeals affirmed, holding that, "[a]lthough providing and administering pension plans for workers is certainly an appropriate and traditional union function," the Fund had "failed to meet its heavy burden of demonstrating unambiguous entitlement to tax-exempt status." A-8, -9. To satisfy this standard, a taxpayer must, according to the court, "identify[ ] a Revenue Ruling

---

[3] The IRS revoked the Merchant Navy Plans' favorable rulings, on a prospective-only basis, on August 18, 1997.

awarding an exemption in a case having facts and circumstances 'substantially the same'" as its own. A-7. The court of appeals also rejected the Fund's reliance on section 7805(b), concluding that neither section 7805 nor *International Business Machines v. United States*, 343 F.2d 914 (Ct. Cl. 1965), required the IRS to perpetuate its original "error" (recognizing the Merchant Navy Plans exempt status) by granting the same "mistaken" exemption to other taxpayers like the Fund. A-10-12.

REASONS FOR GRANTING THE PETITION

The decision below presents a square conflict with *Morganbesser* v. *United States*, 984 F.2d 560 (2d Cir. 1993), the decision of another circuit. In *Morganbesser*, the Second Circuit concluded that a pension plan, jointly administered by employee and employer representatives (like the Health Workers Fund here), qualified as a tax-exempt labor organization under section 501(c)(5). In contrast, the D.C. Circuit explicitly rejected *Morganbesser*, stating that the Second Circuit had relied on "dubious" precedent rather than "applying the 'unambiguous' standard" (for entitlement to exemption) that the D.C. Circuit itself found controlling. A-10.[4] This conflict among the circuits involves an important question of federal law. More than twenty cases presenting the same issue, and covering more than $23 million in disputed taxes, are currently pending in the United States Tax Court.[5]

---

[4] The United States Court of Appeals for the First Circuit, in *Tupper v. United States*, 134 F.3d 444, 449 (1st Cir. Jan. 12, 1998), has now joined the D.C. Circuit in holding that a multiemployer pension plan does not qualify under section 501(c)(5).

[5] These cases are docketed as No. 4691-97 and Nos. 10019-97 through 10038-97, and involve the plans of such entities as British Petroleum and Unilever.

Moreover, by concluding that an entity can demonstrate the supposedly requisite "unambiguous entitlement" to section 501(c)(5) exemption only "by identifying a Revenue Ruling awarding an exemption in a case having facts and circumstances 'substantially the same'" as its own, the court both misinterpreted "unambiguous entitlement" authority, and established an untenable interpretation of section 501(c)(5). Many entities universally recognized as exempt under section 501(c)(5), including labor unions themselves, are covered by no such Revenue Ruling, and may thus be adversely affected by the court's holding.

Finally, in light of IRS recognition of 501(c)(5) exempt status for two similarly-situated British pension plans during the period in question, the failure to treat the Health Workers Fund as exempt is an abuse of the discretion granted by Code section 7805(b) and a violation of U.S. treaty obligations.

I. The Second Circuit Is Right; a Fund Like Petitioner Meets the Statutory, Regulatory, Judicial and Publicly Promulgated Administrative Definitions for a Labor Organization Exempt from Tax Under Code Section 501(c)(5).

A. The Code and Regulations

As the *Morganbesser* court noted, "[t]he Code provides no definition of what constitutes a 'labor organization.'" 984 F.2d at 562. Regulations adopted under section 501(c)(5) are only slightly more expansive, describing such exempt organizations as those (1) having no net earnings inuring to the benefit of any member;[6] and (2)

---

6 As the district court correctly concluded here, the inurement requirement "is satisfied by the Fund because payments do not discriminate between similarly situated employees." A-19.

having as their goals the betterment of labor conditions, the improvement of their products, and the development of greater efficiency. Treas. Reg. § 1.501(c)(5)-1(a).[7]

The courts and the IRS itself, however, have long recognized that the term "labor organization" covers not only traditional labor unions, but also other entities whose activities and purposes would be appropriate to such a union, and who have a sufficient "nexus" with a traditional representational entity. Construing relevant authority, the Second Circuit properly concluded that the betterment of workers' conditions in the fashion accomplished by the Fund is such an activity and purpose,[8] and that the Fund is,

---

[7] In an apparent effort to undo the Second Circuit's *Morganbesser* decision, the Treasury proposed a new regulation under Code section 501(c)(5) in December of 1995. However, that regulation is effective only for periods beginning more than two years after the 1993 year at issue here. Moreover, promulgation of this regulation (even assuming its validity) does not moot for others the issue raised in this Petition. As noted above, numerous foreign pension funds have ongoing disputes with the IRS, both at the judicial and administrative levels, relating to open tax years occurring prior to the effective date of the new regulation. In addition, entities other than pensions plans, which are unaffected by the new regulation, may nonetheless be subjected to the court of appeals' unambiguous entitlement standard, and improperly forced to identify a relevant Revenue Ruling.

[8] From the inception of the American labor movement, the provision of employee benefits has been a major characteristic of labor unions. U.S. Department of Labor, *Brief History of the American Labor Movement* 1 (1957); Teresa Ghilarducci, *Labor's Capital: The Economics and Politics of Private Pensions* 26 (1992) (noting that the earliest unions provided insurance plans for death and disability and maintained old-age homes.); John Mitchell, *Organized Labor* 104 (1903) (stating that the most direct benefit derived by workmen from their unions is insurance against death, accident, sickness, and in some case loss of tools or failure to secure work). Additionally, labor unions provided retirement benefits for their members for many years prior to the 1909 congressional decision to exempt labor organizations from tax. U.S. Department of Labor, *National Union Benefit Plans 1947-1967* 1 (1970) (stating that, beginning in the U.S. around 1880, unions provided aid to members in cases of death of sickness and old age); *see also* James

therefore, described by Code section 501(c)(5) and the regulations thereunder.

B. Administrative and Judicial Authority Confirms that the 501(c)(5) Exemption Covers Entities Other than Unions.

In a 1983 General Counsel Memorandum ("GCM") considering section 501(c)(5) status, the IRS explicitly recognized that entities other than unions can qualify as labor organizations:

> [I]n general, labor organizations include those which have as their principal purpose the representation of employees in such matters as wages, hours of labor, economic benefits, and the general fostering of matters affecting the working conditions of their members. . . . However, in numerous instances the Service has recognized as exempt under section 501(c)(5) organizations which did not directly represent employees in the manner described . . . . *In such instances, the organizations have been held exempt because they were conducting activities appropriate to exempt labor organizations.*

GCM 38981 (January 26, 1983) (citations omitted) (emphasis supplied).

B. Kennedy, *Beneficiary Features of American Trade Unions* 100-03 (1908) (discussing retirement benefits provided by unions in the late nineteenth and early twentieth centuries); Murray Latimer, *Trade Union Pension Systems* 12-26 (1932) (same).

Numerous published Revenue Rulings also recognize this proposition. In Revenue Ruling 67-7, 1967-1 C.B. 137, for example, the IRS held as follows:

> An organization which is engaged in activities appropriate to an exempt labor union may itself qualify for exemption under section 501(c)(5) of the Code.

Similarly, Revenue Ruling 75-473, 1975-2 C.B. 213, states the following:

> An organization that is engaged in activities appropriate to a labor union, even though technically not a labor union itself, may qualify for exemption under section 501(c)(5) . . . if its activities are appropriate union activities and are conducted as a part of the proper activities of the parent labor organization, so that it is not merely an independent undertaking.

Many of these IRS rulings cite *Portland Co-operative Labor Temple Ass'n v. Commissioner,* 39 B.T.A. 450 (1939), *acq.*, 1939-1 C.B. 28, for the proposition that the term "labor organization" covers entities other than unions.[9] That decision notes the difficulty of defining the term, but also observes the following:

> The term has been used continuously for 30 years [as of 1939] to bestow tax exemption, and it never has been found desirable by Congress to qualify it or by the

---

[9] GCM 37942 (April 27, 1979) states that "[t]he most frequently cited judicial interpretation of the term 'labor organization' is found in *Portland* . . . ."

> administrator to give it a narrowing interpretation . . . . It bespeaks a liberal construction to embrace the common acceptation of the term, including labor unions and councils and the groups which are ordinarily organized to protect and promote the interests of labor.

39 B.T.A. at 455. It is thus clear that entities other than labor unions may also qualify as section 501(c)(5) labor organizations where their purposes and activities would be appropriate to a labor union.

C. The Fund Meets the Requirements for 501(c)(5) Exemption and Should Be Recognized as Exempt.

Revenue Ruling 75-473, 1975-2 C.B. 213, provides that, to qualify as an exempt entity under section 501(c)(5), an organization must meet two requirements: it must (1) be engaged in activities appropriate to a labor union; and (2) have the appropriate connection, or nexus, to the parent labor organization.

The court of appeals below explicitly recognized that the Fund meets the first requirement ("providing and administering pension plans for workers is certainly an appropriate and traditional union function"). A-8. It nonetheless found against the Fund "because the Revenue Rulings do not unambiguously stand for the proposition that that *any* organization bearing *some* connection to a traditional labor union" is necessarily exempt. *Id.* (emphasis supplied). The Fund, however, has not argued that "any" organization with "some" connection to a union will qualify. Instead, the Fund argues that *its* connection to traditional labor organizations -- namely, its formation and sustenance through collective bargaining, and its joint administration by equal numbers of employer and employee representatives --

is precisely the connection called for in relevant Revenue Rulings and other IRS authority

In contrast to the lower court here, the Second Circuit in *Morganbesser* relied on an IRS General Counsel Memorandum which defined the requisite connection:

> [W]e have always considered it significant that the organization was in some way connected with more traditional types of labor organizations . . . . [W]e think one of the most reliable indicators of a "labor organization" is that it is . . . formed as a result of . . . representation [of a union], or is connected with or supplements or supports in some way organizations which do perform that role.

984 F.2d at 563 (citations omitted in original) (quoting GCM 37942 (April 27, 1979)). Applying this standard for the connection required, the Second Circuit found the plan before it there to qualify for 501(c)(5) exemption:

> The trust was formed as a result of a collective bargaining agreement negotiated by the union to supplement the function of the union in providing employees' pension benefits. The IRS' own interpretation therefore suggests that the trust can be classified as a labor organization.

984 F.2d at 563.

The Fund at issue here was unquestionably "formed as a result of representation" by the Dutch hospital unions, "is connected with" such unions (and those representing Dutch social service workers), and "supplements or supports [them] in some way." In other words, it too clearly has the

"connection" to a traditional representational entity that is required of a nonrepresentational "labor organization." In harmony with the Second Circuit's *Morganbesser* decision and stated IRS positions, the Fund meets both tests (proper purpose and nexus), and thus qualifies as a "labor organization" exempt from income tax under Code section 501(c)(5).

D. The Analytic Approach of the Second Circuit Was Correct.

1. Relevance of GCMs

To reach its contrary result, the D.C. Circuit simply ignored the IRS General Counsel Memoranda that, as the Second Circuit notes, constitute the analytic backbone of 501(c)(5) determination:

> In view of the dearth of case law in this area, the only real guidance for what qualifies as a labor organization is found in the GCMs issued by the IRS. While we are not giving precedential value to the GCMs, in this case of first impression it becomes necessary to rely on them for interpretive guidance.

984 F.2d at 564. Other courts have agreed with the Second Circuit on the relevance of GCMs.[10] Thus, in order to

---

[10] *See United States v. Wisconsin Power and Light Co.*, 38 F.3d 329, 334 (7th Cir. 1994) ("GCMs . . . are 'helpful in interpreting the Tax Code when faced with an almost total absence of case law'"); *Idaho First Nat'l Bank v. Commissioner*, 997 F. 2d 1285, 1290 (9th Cir. 1993) (relying on GCM cited *by the IRS* to support its position) ; *Herrmann v. E.W. Wylie Corp.*, 766 F. Supp. 800, 802-03 (D.N.D. 1991); *see, e.g . Corn Prods. Ref. Co. v. Commissioner*, 350 U.S. 46, 52-53 (1955); *Bouchard v. Crystal Coin Shop*, 843 F.2d 10, 15 (lst Cir. 1988); *United States v. Stowe-Woodward, Inc.*, 306 F.2d 678, 680-81 (1st Cir. 1962).

conclude that the Fund was not a 501(c)(5) organization, the court below was required to reject not only the well-reasoned analysis of the Second Circuit in *Morganbesser*, but also the analytic framework established by the IRS itself in publicly promulgated General Counsel Memoranda.

2. Unambiguous Entitlement

The court below also criticizes its sister circuit for "never mentioning or applying the 'unambiguous' standard that we find controlling." A-10. The standard in question was stated as follows: "[C]ourts may not infer exemptions when Congress has not clearly provided for them." A-4. As so stated, this is a proposition with which the Fund agrees, but the D.C. Circuit's reliance thereon was mistaken, since the Fund does not argue that an exemption should be inferred. The Fund contends instead that it falls squarely within a statutory exemption unambiguously set forth in Code section 501(c)(5). Thus, the Second Circuit appropriately saw no need to discuss the "unambiguous entitlement" doctrine, let alone find it controlling. None of the Court's decisions cited on this point below involve a similar situation.

In *United States* v. *Wells Fargo Bank*, 485 U.S. 351 (1988), the issue was whether a statutory income tax exemption applicable to "Project Notes" covered estate tax liability as well. In other words, should a clear, statutory exemption from income taxes be extended by inference to cover other kinds of taxes as well? That is not the question here. Congress clearly provided an exemption for "labor organizations." The issue is whether that term encompasses Petitioner. Had the question in *Wells Fargo* been the meaning of the statutory term "Project Notes," to which an income tax exemption had clearly been granted, the decision might have been relevant.

Similarly, in *Trotter* v. *Tennessee*, 290 U.S. 354 (1933), the issue was whether a tax exemption for disability payments to veterans could be inferred to cover property taxes on real estate purchased with such payments. The issue was not, as would parallel the question here, whether the payments made to the veteran were of the type specified in the exemption.

In *United States* v. *Stewart*, 311 U.S. 60 (1940), the issue was whether a statutory exemption for "income derived from" specified bonds covered not only interest income, but also gains in principal value realized from trading in such bonds. In *Yazoo & Miss. Valley R.R. Co.* v. *Thomas*, 132 U.S. 174 (1889), the issue was whether an exemption granted by statute to a railroad "for a term of twenty years from the completion of said railroad to the Mississippi river, but not to extend beyond twenty-five years from the date of the approval of this act" covered the period *before* completion to the Mississippi river -- a period not specifically addressed by the statute. *Id.* at 69.

None of these cases involves the situation present here: a clear and unambiguous grant of income tax exemption to a specified category of entities, with a dispute over whether a particular organization falls within the specified category. Such a situation, the Fund respectfully submits, cannot properly be resolved by simple invocation of the "unambiguous entitlement" doctrine. That approach would put the litigating positions of the IRS on exemptions beyond judicial review, since IRS opposition itself would presumably establish a sufficient doubt regarding qualification for exemption. The meaning of a statutory category to which exemption has clearly and unambiguously been granted is appropriately resolved by straightforward judicial interpretation of the term in question. That, however, is precisely what the D.C. Circuit, unlike the Second Circuit, declined to do.

II. The Lower Court Attempted to Resolve an Important Issue of Federal Law, But Adopted an Interpretative Position That Is Both Untenable and Demonstratively Unworkable.

Labor unions and their related entities constitute an important element in our societal fabric, and their tax exemption is a significant economic component of the role they play. Thus, defining the types of entities that qualify as "labor organizations" under section 501(c)(5) of the Code presents an important issue of federal law. The court below attempted to resolve this important question solely on the basis of the "unambiguous entitlement" doctrine, adopting the following standard for demonstrating unambiguous entitlement, and thereby qualifying as a "labor organization:"

> The Fund can thus prevail only by identifying a Revenue Ruling awarding an exemption in a case having facts and circumstances "substantially the same" as this case.

A-7. The standard adopted by the court below (a favorable Revenue Ruling as a precondition to exemption) represents a novel approach to statutory interpretation, is analytically untenable, and would prove unworkable, excluding from exemption a vast number of entities generally recognized as labor organizations. Its "Catch-22" analysis would require that a taxpayer secure a written endorsement of its exemption from the very agency that disputes its status.

A. The Lower Court's Test Is Not Viable.

The court below finds fifteen Revenue Rulings involving section 501(c)(5), and concludes that none awards an exemption in a case having facts and circumstances "substantially the same" as those involved here. A-7. It thus concludes that the Fund is necessarily not a "labor

organization." However, examination of the rulings in question makes clear that they alone cannot, as the court effectively holds, define the universe of all labor organizations.

Eleven of the rulings are favorable, and recognize labor organization status for the following specified entities: an apprenticeship and training committee, a nurses' association, a stewardship fund, a teachers' association, a dispatch hall, a union newspaper publisher, an entity coordinating legislative, legal and public relations efforts for member unions, and a strike fund.[11] Under the analysis of the court below, this is necessarily the sum total of entities exempt under section 501(c)(5). The IRS itself, however, has recognized numerous other entities as labor organizations, including, for example, hardship funds, funds receiving payments pursuant to a collective bargaining agreement for disbursal to various employee benefit funds, dues-financed legal services organizations, vacation resorts for union members, retraining and severance benefit organizations, and a pension trust.[12] There are no Revenue

---

[11] Respectively, Rev. Rul. 78-42, 1978-1 C.B. 158 and Rev. Rul. 59-6, 1959-1 C.B. 121; Rev. Rul. 77-154, 1977-1 C.B. 148; Rev. Rul. 77-5, 1977-1 C.B. 146; Rev. Rul. 76-31, 1976-1 C.B. 157; Rev. Rul. 75-473, 1975-2 C.B. 213; Rev. Rul. 68-534, 1968-2 C.B. 217; Rev. Rul. 74-596, 1974-2 C.B. 167; and Rev. Rul. 67-7, 1967-1 C.B. 137. In addition, one of the eleven rulings addresses whether an organization of law enforcement officers (assumed by the ruling to be exempt under section 501(c)(5)) can provide funds for counsel to members involved in legal cases involving the performance of their official duties (Rev. Rul. 75-288, 1975-2 C.B. 212), and another holds that an organization providing death, sick, accident and similar benefits to its members may qualify for exemption under section 501(c)(5) (Rev. Rul. 62-17, 1962 C.B. 87).

[12] Respectively, GCM 37424 (Feb. 22, 1978); GCM 37726 (Oct. 20, 1978); GCM 38981 (Jan. 26, 1983); GCM 34634 (Oct. 8, 1971); GCM 35790 (April 23, 1974); GCM 35862 (June 20, 1974). These GCMs are cited here not as precedent, but rather as a factual demonstration that, under the view of the IRS itself, 501(c)(5) status is

Rulings recognizing 501(c)(5) exemption on "substantially the same" facts as these entities, yet the IRS itself has recognized their 501(c)(5) status.[13]

Nor is there a Revenue Ruling with "substantially the same" facts as those surrounding the labor temple -- an organization operating an office building containing union offices, meeting halls, auditoriums, a recreation hall, shops, a restaurant, two bars and a pool room used mostly by union members -- held to be exempt in *Portland Cooperative*, 39 B.T.A. 450, a decision cited by many of the IRS rulings.

Indeed, there is no Revenue Ruling directly holding that labor unions themselves, or their federations or councils (*e.g.*, the AFL-CIO) qualify as 501(c)(5) organizations. Surely the lack of such a ruling, whether combined with the "unambiguous entitlement" doctrine or not, cannot serve to deny such entities exemption under section 501(c)(5). Nor should it deny exemption to the Fund.

Moreover, the court's decision is at odds with the Revenue Rulings under section 501(c)(5) that do exist. The appeals court properly concluded, as did the district court before it, that the provision of pension benefits constitutes an appropriate and traditional labor organization function. However, the court then proceeded to ignore several Revenue Rulings establishing that joint employer-employee administration meets the only other "labor organization" requirement -- that there be an appropriate connection

---

not confined to such entities as are specifically covered by Revenue Rulings.

[13] As established by the record in this case, the IRS also recognized as exempt (a recognition it has now revoked prospectively) the British Merchant Navy plans, which (i) are jointly administered, multiemployer pension plans, and (ii) do present "substantially the same" facts as the Fund.

between the entity in question and a traditional labor organization involved in collective bargaining, *i.e.*, a union.[14] The court justified this approach by stating that the authority regarding the purpose and function of entities "controlled by unions" should be dismissed as irrelevant (since the Fund is not so controlled), while authority holding that union control was not essential should also be disregarded, since none of the entities there involved was "substantially similar to the Fund." A-7. In other words, Revenue Rulings dealing with the two basic requirements for qualification as a labor organization are relevant only if a single ruling deals with both requirements at the same time. *Id.* The court cites no basis for this approach. Although no single Revenue Ruling holds exempt an entity "substantially the same" as the Fund, the rulings collectively do demonstrate the Fund's exempt status.

B. The Court Misread Relevant Authority.

As discussed below, the court of appeals also appeared to agree with the district court's holding that a 501(c)(5) organization must meet each of three regulatory criteria, which have always and properly been viewed as alternative requirements. A-6, 19-20. Under this view, virtually no entity -- including those covered by favorable Revenue Rulings -- would qualify as exempt.

1. Conjunctive or Disjunctive Regulatory Criteria

The courts below concluded that the Treasury regulation under section 501(c)(5) requires labor organizations to meet all three of the following criteria:

---

[14] Rev. Rul. 75-473, 1975-2 C.B. 213; Rev. Rul. 59-6, 1959-1 C.B. 121.

> Have as their objects [i] the betterment of the conditions of those engaged in such pursuits [(*i.e.*, labor)], [ii] the improvement of the grade of their products, and [iii] the development of a higher degree of efficiency in their respective occupations.

A-6, -19 (*citing* Treas. Reg. § 1.501(c) (5) -1 (a) (2)).

Both lower courts specifically found that the Fund met the first of these criteria (*see* A-6, -20), which is the requirement to which "labor organization" authorities over the last 80 years have traditionally referred. The courts both went on, however, to conclude that the Fund did not meet the other two and therefore could not qualify for exemption under section 501(c)(5). *Id.* As demonstrated below, the conclusion that all three criteria must be met is unsupported by applicable principles of construction, inconsistent with existing 501(c)(5) authority, and contrary to common sense.[15]

a. General principles of construction

The Sutherland treatise on statutory construction says the following regarding, on the one hand, the theoretically proper and, on the other, the practical reality of "and/or" usage:

> Where two or more requirements are provided in a section and it is the legislative

---

15 The government, at oral argument before the court of appeals, conceded that the taxpayer's position on this point was correct. Nevertheless, the court of appeals stated in its opinion that, had the IRS not specifically declined to rely on the regulation, the Fund's failure to satisfy all three regulatory criteria, as applied by the court of appeals and the district court, "would otherwise end this case." A-6.

> intent that all of the requirements must be fulfilled in order to comply with the statute, the conjunctive "and" should be used. Where a failure to comply with any requirement imposes liability, the disjunctive "or" should be used . . . . There has been, however, so great laxity in the use of these terms that courts have generally said that the words are interchangeable and that one may be substituted for the other, if consistent with the legislative intent.[16]

A significant body of case law illustrates and confirms this principle.[17] Thus, use of the word "and" does not automatically mandate that the regulation in question be read in the conjunctive, requiring an entity to meet each of its three regulatory criteria.

b. Existing 501(c)(5) authority

The courts below cited no 501(c)(5) authority explicitly discussing this issue, and there appears to be none. There is, however, a wealth of authority citing only one (or

---

16 1A Norman J. Singer, *Statutes and Statutory Construction* § 21.14 (5th ed. 1993) (emphasis supplied).

17 *See e.g., United States v. Fisk*, 70 U.S. 445, 447 (1865) ("In the construction of statutes, it is the duty of the court to ascertain the clear intention of the legislature. In order to do this, courts are often compelled to construe 'or' as meaning 'and,' and again 'and,' as meaning 'or'"); *see also Bruce v. First Fed. Sav. and Loan Ass'n*, 837 F.2d 712, 717 (5th Cir. 1988) ("[t]o read the word 'and' in the disjunctive [in a prohibition of the Thrift Institutions Restructuring Act] is to give the word its clearly intended effect"); *Peacock v. Lubbock Compress Co.*, 252 F.2d 892 (5th Cir. 1958) (exemption under Fair Labor Standards Act provision for persons engaged in "ginning and compressing" cotton construed to exempt a person engaged only in ginning or compressing).

two) of the regulation's three criteria as sufficient to support exemption for a particular entity.

In the *Morganbesser* decision itself, the Second Circuit summarized the regulation's requirements as follows: "[Al labor organization can have no net earnings benefiting any member and its object must be to better the working conditions of those engaged in labor." 984 F.2d at 562. Betterment of working conditions, the first of the three criteria, was the only criterion deemed applicable.

In *National League of Postmasters v. Commissioner,* 86 F.3d 59, 62 (4th Cir. 1996), the court said the following regarding this regulation: "The [appellant's] tax-exempt purposes are defined in part by regulation, which provides that a tax-exempt labor organization must have as its object 'the betterment of the conditions' of those engaged in labor." Again, the betterment of working conditions was the only criterion discussed. *See also* Rev. Rul. 74-167, 1974-1 C.B. 134 ("a labor organization described in section 501(c)(5) is one that has as an objective the betterment of the conditions of those engaged in labor").[18] As demonstrated by this authority, meeting any one criterion is adequate, and the lower courts specifically held that the Fund does just that. *See* A-6, -19-20.

c. Common sense

The district court blithely concluded, without any discussion of the point, that "traditional labor unions clearly

---

[18] Virtually all other Revenue Rulings recognizing 501(c)(5) status for labor organizations discuss how the entity meets one or two, *but not all three*, of the regulation criteria in question. *See* Rev. Rul. 78-42, 1978-1 C.B. 158; Rev. Rul. 77-154, 1977-1 C.B. 148; Rev. Rul. 77-5, 1977-1 C.B. 146; Rev. Rul. 76-31, 1976-1 C.B. 157; Rev. Rul. 75-473, 1975-2 C.B. 213; Rev. Rul. 75-288, 1975-2 C.B. 212; Rev. Rul. 74-596, 1974-2 C.B. 167; Rev. Rul. 67-7, 1967-1 C.B. 137; Rev. Rul. 62-17, 1962-1 C.B. 87; *but see* Rev. Rul. 59-6, 1959-1 C.B. 121.

fall within this definition," *i.e.*, the definition produced by that court's interpretation of the regulation. A-19. One would hope this to be so. A regulatory definition that excluded traditional labor unions would obviously fail to square with common sense, the plain meaning of the term "labor organization," and the evident intent of the legislative drafters.

But do traditional labor unions in fact meet the regulatory definition as interpreted by the lower (and apparently, the appellate) court? Must a labor union really have as its objects "the improvement of the grade of . . . products [produced by its members]" and "the development of a higher degree of efficiency in their respective occupations?" Some unions undoubtedly have such goals, but these aims, to the extent present at all, have traditionally been management prerogatives. In order to qualify for tax exemption, must airline unions really promote the concept of two pilots rather than three in every cockpit? Must railroad unions promote the elimination of the fireman's position following the introduction of electric locomotives? Is it a requirement that auto worker unions promote better-built cars that will need replacement less often, resulting in fewer car purchases and fewer auto worker jobs?

To state the question is to answer it. Worker efficiency and the improvement of product quality are not essential elements in qualifying as a traditional labor union, the basic function of which is to improve working conditions for its members. Nor are they essential to qualifying as a "labor organization" within the meaning of Code section 501(c)(5). In this context, it is clearly appropriate, indeed necessary, to read the regulation's "and" in the disjunctive. The findings of the courts below that the Fund meets the first criterion are dispositive regarding the Fund's satisfaction of the regulation.

2. Improper Distinctions Between Foreign and Domestic Entities and "On-The-Job" and "After-The-Job" Benefits Under Section 501(c)(5)

The court of appeals decision also erroneously suggests that a different 501(c)(5) standard may apply to foreign, as opposed to domestic, entities. A-8. However, Revenue Ruling 66-177, 1966-1 C.B. 132 (quoted here in its entirety), makes clear that foreign entities are subject to precisely the same standard:

> The fact that an organization has been formed under foreign law will not preclude its qualification as an exempt organization under section 501(a) of the Internal Revenue Code of 1954 if it meets the tests for exemption under that section.

Moreover, a more burdensome standard would violate the spirit if not the letter of United States income tax treaty obligations.[19]

The court of appeals also attempts to distinguish Revenue Rulings holding that joint employer/employee control of the organization is no bar to (c)(5) status. It does so by finding supposed distinctions between entities focusing on conditions "on the job" as opposed to conditions "after the job." A-8. There are two mistakes in this analysis. First, a pension is no more an "after-the-job" condition than a

---

[19] Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, December 18, 1992, U.S.-Neth., art. 28(1), S. Treaty Doc. No. 103-6 (1993) ("[n]ationals of one of the States shall not be subjected in the other State to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances are or may be subjected").

worker's weekly pay. Economists have long recognized pension entitlement as an important component of the overall wage package.[20] Second, the Revenue Rulings under section 501(c)(5) draw no such distinction in any event. Indeed, Revenue Ruling 62-17, 1962-1 C.B. 87, explicitly holds that "labor organizations were exempted for the very reason that they operated, in part, as mutual benefit organizations providing death, sick, accident, and similar benefits to their members." Thus, a core purpose of section 501(c)(5) was to recognize and encourage the efforts of (c)(5) organizations in providing benefits and otherwise improving the "after the job" conditions of workers.

III. The Health Workers Fund Is Entitled to a Refund Because the IRS Has Concurrently Treated Other, Similarly Situated Foreign Pension Funds as Tax-Exempt.

For the reasons discussed above, the Health Workers Fund clearly meets the requirements for a labor organization under Code section 501(c)(5). As discussed below, even were it not a 501(c)(5) organization, it would still be entitled to a refund.

In Code section 7805(b), Congress explicitly granted discretion to limit the retroactivity of administrative tax determinations. In exercising 7805(b) discretion, the IRS is required to accord equal treatment to similarly situated taxpayers. Since, for the period in question, the IRS had granted 501(c)(5) recognition to the Merchant Navy plans, and perhaps other similarly situated foreign pension funds, denial of this treatment to the Health Workers Fund for the period in question would constitute an abuse of 7805(b) discretion.

---

[20] *See, e.g.*, A. DeRoode, *Pensions as Wages*, 3 Am. Econ. Rev. 287 (1913).

A. The Government Must Treat Similarly Situated Taxpayers in the Same Manner.

The principle of equal treatment for similarly situated taxpayers under Code section 7805(b) has been recognized by numerous judicial decisions.[21] The facts of one such case bear a striking resemblance to those before this Court. In *International Business Machines Corp. v. United States*, 343 F.2d 914 (Ct. Cl. 1965) (hereinafter "*IBM*"), IBM had sought a refund of excise taxes paid on the sale of certain of its computers. Some years before, another manufacturer, Remington, had received an IRS ruling that such computers were not subject to tax. Remington subsequently received refunds for prior years, and, on the strength of the ruling, did not pay excise taxes thereafter.

Although IBM applied for a similar ruling immediately after Remington received its ruling, a number of

---

[21] *See, e.g, Baker v. Commissioner*, 787 F.2d 637, 643 (D.C. Cir. 1986) ("[t]ax cases . . . are encompassed within the general concern that officialdom avoid arbitrary distinctions between like cases"); *Baker v. United States*, 748 F.2d 1465, 1466 (11th Cir. 1984) (refusal to grant equal treatment to similarly situated taxpayers for prior periods an abuse of discretion despite change in IRS view generally); *Farmers' & Merchants' Bank v. United States*, 476 F.2d 406, 409 (4th Cir. 1973) ("No rational basis is found here for differentiating between the appellant and the other banks. Fortunately, such abuse of discretion is reviewable [under 7805(b)] and we decry it.") (citation omitted); *Chock Full O'Nuts Corp. v. United States*, 453 F.2d 300, 302-03 n.6 (2d Cir. 1971) ("courts have declined to give retroactive effect to regulations or rulings . . . when it would lead to inequality of treatment between taxpayers"); *Wagner v. United States*, 387 F.2d 966, 972 n.7 (Ct. Cl. 1967) ("where the Internal Revenue Service made a conscious determination to tax one taxpayer (or group of taxpayers) retroactively while excluding all others similarly situated from retroactive application of the law, the levy was held invalid on the basis of prejudicial discrimination") (citations omitted); *Dunn v. United States*, 468 F.Supp. 991, 995 (S.D.N.Y. 1979) ("Courts have declined to give retroactive effect to regulations and rulings . . . where they would . . . lead to unequal treatment among similarly situated taxpayers, or be unduly harsh if applied to a specific case") (citations omitted).

years went by before the IRS ruled adversely on IBM's request. The IRS then revoked Remington's ruling, concluding that Remington too was subject to these taxes in the future, but it granted Remington retroactive relief under section 7805(b) for prior years. The issue before the court was the dissimilar treatment of IBM in the years before Remington's ruling was revoked.

The court held that the refusal to accord IBM the same treatment afforded Remington was an abuse of discretion under section 7805(b):

> Implicit . . . in the Congressional award of discretion to the Service, through Section 7805(b), is the power as well as the obligation to consider the totality of the circumstances surrounding the handing down of a ruling -- including the comparative or differential effect on the other taxpayers in the same class. "The Commissioner cannot tax one and not tax another without some rational basis for the difference." *United States v. Kaiser*, 363 U.S. 299, 308, 80 S. Ct. 1204, 1210, 4 L. Ed. 2d 1233 (1960) (Frankfurter, J., concurring). This factor has come to be recognized as central to the administration of the section. . . . Equality of treatment is so dominant in our understanding of justice that discretion, where it is allowed a role, must pay the strictest heed.

343 F.2d at 920 (citations omitted). Based on this holding, the court ordered refunds to IBM for the years in question.

As noted above, numerous other decisions reflect similar conclusions. Indeed, the IRS has explicitly recognized this principle in concluding that it would be

inappropriate to disqualify a pension plan for an alleged violation that had not been enforced against other plans. GCM 34623 (Sept. 24, 1971) ("it would be an abuse of discretion to apply the rule in some cases and to preclude such contributions in others").

B. The Health Workers Fund Is Entitled to the Same Treatment as the Merchant Navy Plans.

These principles govern here. Like IBM, the Fund had its own determination letter application pending during the taxable period in question. The similarly situated Merchant Navy plans were determined by the IRS to be tax exempt. As with the Remington ruling, the Merchant Navy determinations were ultimately revoked, but on a prospective-only basis that did not affect the period in question. In these circumstances, it would be an abuse of the Secretary's discretion under section 7805(b) if the IRS failed to provide to the Health Workers Fund the same favorable treatment afforded to the Merchant Navy plans.

The lower court's assertion that the *IBM* decision applies only to direct competitors is incorrect. *See* A-11. The key to the *IBM* holding is that the IRS may not make arbitrary distinctions among similarly situated taxpayers. Thus, the requirement of consistency is not limited to direct competitors. As explained by the court in *IBM*,

> It would weaken and dilute the standard of equality Congress put into [section 7805] to add the gloss that, even though the service violated the statute, the taxpayer is without remedy unless he proves that he lost business or competitive position.

343 F.2d at 924. Thus, under section 7805 as applied by *IBM* and similar decisions, the Fund should receive a refund of U.S. taxes paid for 1993.

The discriminatory treatment of the Fund for the year at issue also violates Article XI(3) of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Kingdom of the Netherlands, which provides as follows:

> Nationals and companies of either Party shall in no case be subject, within the territories of the other Party, to the payment of taxes, fees or charges imposed upon or applied to income, capital, transactions, activities or any other object, or to requirements with respect to the levy and collection thereof, more burdensome than those borne by nationals, residents and companies of any third county.

Treaty of Friendship, Commerce and Navigation, Dec. 5, 1957, U.S.-Neth., art. XI, para. 3, 8 U.S.T. 2043, 2060-61.

CONCLUSION

Based on the foregoing, the petition for writ of certiorari should be granted.

Respectfully submitted,

K. Peter Schmidt
Counsel of Record
Philip W. Horton
James P. Joseph
ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000
Counsel for Petitioners

APPENDIX

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

Argued September 29, 1997
Decided November 14, 1997

No. 97-5006

STICHTING PENSIOENFONDS VOOR DE GEZONDHEID,
GEESTELIJKE EN
MAATSCHAPPELEIJKE BELANGEN,
APPELLANT

v.

UNITED STATES OF AMERICA,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 95cv01568)

K. Peter Schmidt argued the cause for appellant. With him on the briefs was *Philip W. Horton*.

Robert W. Metzler, Attorney, U.S. Department of Justice, argued the cause for appellee. With him on the briefs were *Mary Lou Leary*, Acting U.S. Attorney at the time the brief was filed, *Loretta C. Argrett*, Assistant Attorney General, U.S. Department of Justice, and *Kenneth L. Greene*, Attorney.

Before: EDWARDS, *Chief Judge,* GINSBURG and TATEL, *Circuit Judges*.

TATEL, *Circuit Judge*: A Dutch pension fund jointly controlled by employers and unions and claiming to be a "labor organization" as described in section 501(c)(5) of the Internal Revenue Code challenges the Internal Revenue Service's denial of its application for exemption from federal income taxation. Because tax exemptions require unambiguous proof and because we can find no authority directly entitling the pension fund to an exemption, we affirm the district court's grant of summary judgment for the United States.

Appellant Stichting Pensioenfonds Voor de Gezondheid, Geestelijke en Maatschappelijke Belangen (the "Fund") is a Dutch pension plan formed in 1969 following negotiations between labor unions representing hospital workers and the Dutch national hospital employers' association. Soon after the Fund's formation, the Dutch government granted it "compulsory treatment," thus requiring all private hospitals and their employees to participate. The Fund has since expanded to include fourteen health and social welfare sectors in the Netherlands. The Fund has no principal place of business in the United States, nor does it engage in any trade or business here.

A board of directors controls the Fund's management and assets. Pursuant to Dutch law, employers and unions each appoint half of the board's twelve directors. The six

employer directors and the six union directors enjoy equal voting power. If all directors are not present at a meeting, each side may only cast as many votes as the side with the fewer directors. On all policy issues, employer and union directors must agree, or the board may not act. Unions and employers also designate equal numbers of directors to all committees formed by the board.

As the second largest private pension fund in the Netherlands, the Fund covered approximately one million people as of December 31, 1993, some of whom were union members and some of whom were not. About 600,000 were active contributing members. Some 330,000 of the remaining members were "sleepers," a Dutch idiom referring to employees no longer working in industry sectors covered by the Fund but entitled to receive pension benefits upon retirement by virtue of previous employment. The remaining members were retirees already receiving pension benefits.

Both employers and employees contribute to the Fund. The board of directors establishes required contribution rates, as well as the respective portions of the total contribution paid by employers and employees.

The Fund invests in U.S. stocks and mutual funds. In 1993, its U.S. security custodians withheld and paid to the U.S. Treasury over eight million dollars in income tax. Claiming tax-exempt status as a labor organization under section 501(c)(5) of the Internal Revenue Code, *see* 26 U.S.C. § 501(c)(5) (1994), the Fund filed a claim for this amount. Receiving no response from the Service, the Fund filed suit in the U.S. District Court for the District of Columbia.

Noting that taxpayers must prove exemptions "unambiguously," and finding that the Fund lacked "a sufficient nexus with a more traditional labor organization to

qualify as a tax-exempt labor organization itself," the district court granted summary judgment for the United States. *Stichting Pensioenfonds Voor De Gezondheid, Geestelijke En Maatschappelijke Belangen v. United States*, 950 F. Supp. 373, 374, 379 (D.D.C. 1996). In doing so, the district court rejected the Fund's alternative argument that, even if not entitled to tax-exempt status, it should have received a refund pursuant to section 7805(b) of the Code, 26 U.S.C. § 7805(b) (1994) (superceded by 28 U.S.C.A. § 7805(b)(8) (West Supp. 1997)). *Stichting Pensioenfonds*, 950 F. Supp. at 381. We review the district court's grant of summary judgment *de novo*. *Tao v. Freeh*, 27 F.3d 635, 638 (D.C. Cir. 1994).

II

Because the Constitution confers upon Congress exclusive authority to collect taxes to provide for the general welfare of the United States, U.S. CONST. art. I, § 8, cl. 1, only Congress itself may create exemptions from federal tax laws. Given the importance of taxation and the general presumption in favor of taxing all sources of income, courts may not infer exemptions when Congress has not clearly provided for them. *See* 1 JACOB MERTENS, JR., THE LAW OF FEDERAL INCOME TAXATION § 3.49 (Nov. 1991). For this reason, the Supreme Court has consistently held for over a century that a taxpayer must "unambiguously" prove entitlement to an exemption: "Exemptions from taxation are not to be implied . . . . they must be unambiguously proved," *United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988); "[T]hose who seek an exemption from a tax must rest it on more than a doubt or ambiguity. Exemptions from taxation cannot rest upon mere implications," *United States v. Stewart*, 311 U.S. 60, 71 (1940); "As taxation is the rule, and exemption the exception, the intention to create an exemption must be expressed in clear and unambiguous terms . . . . Legislation which relieves any species of

property from its due proportion of the burdens of the government must be so clear that there can be neither reasonable doubt nor controversy in regard to its meaning," *Yazoo & Miss. Valley R.R. Co. v. Thomas*, 132 U.S. 174, 183 (1889). As Justice Cardozo said for a unanimous court over sixty years ago, "Exemptions from taxation are not to be enlarged by implication if doubts are nicely balanced." *Trotter v. Tennessee*, 290 U.S. 354, 356 (1933). With this extremely high standard in mind, we search for some direct authority that unquestionably and conclusively entitles the Fund to the exemption it seeks.

We begin, of course, with the Internal Revenue Code. Section 501(c)(5) exempts labor, agricultural, and horticultural organizations from taxation. 26 U.S.C. § 501(c)(5). The Code neither defines the term "labor organization" nor elaborates on its meaning. The legislative history, moreover, provides no unambiguous guidance. The early twentieth-century congressional debates on whether to include the term "labor organization" in section 501(c)'s precursor had nothing to do with whether jointly controlled entities providing pension benefits should be exempt from federal taxation. Instead, the debates focused on whether the Code's exemption for "fraternal beneficiary societies . . . providing for the payment of life, sick, accident, or other benefits to members" would be understood as covering all labor organizations, a question that Congress answered negatively when it explicitly exempted labor organizations. *See* 44 Cong. Rec. 4154-55 (1909). We agree with the district court that this legislative history provides "little help" in understanding the scope of the term "labor organization." *See Stichting Pensioenfonds*, 950 F. Supp. at 375.

We next turn to the Treasury Regulation that defines the term "labor organization," but which is ultimately unhelpful. It says:

> The organizations contemplated by section 501(c)(5) as entitled to exemption from income taxation are those which:
>
> (1) Have no net earnings inuring to the benefit of any member, and
>
> (2) Have as their objects the betterment of the conditions of those engaged in such pursuits, the improvement of the grade of their products, and the development of a higher degree of efficiency in their respective occupations.

26 C.F.R. § 1.501(c)(5)-1(a) (1997). A nonprofit entity, the Fund clearly satisfies sub-paragraph (1). While the Fund may also satisfy the first of sub-paragraph (2)'s requirements - it has as it object the betterment of employee financial conditions - it cannot meet the other two requirements: it neither works to improve products nor to develop higher degrees of efficiency. The Fund urges us to read sub-paragraph (2) disjunctively, but given the plain meaning of the word "and" we cannot do so. *See* C. K. Ogden, BASIC ENGLISH INTERNATIONAL SECOND LANGUAGE 132 (1968) (*"And* is used for joining words together: *The man and the woman are married. Or* is used for the idea of one of two: *The man or the woman is married."*). Although this conclusion would otherwise end this case — the regulation does not unambiguously entitle the Fund to an exemption — the Service did not rely on the regulation in its brief or at oral argument. Because the Service itself does not argue that the regulation excludes the Fund from labor organization status, we decline to decide the case on that basis.

Finding help in neither the Code nor the regulation, we look next to the IRS's Revenue Rulings, the second most

important agency pronouncements that interpret the Code. Applying the Code to specific situations, Revenue Rulings bind both the Service and the taxpayer. Although Revenue Rulings "do not have the force and effect of Treasury Department Regulations," they are "published to provide precedents to be used in the disposition of other cases, and may be cited and relied upon for that purpose." 26 C.F.R. § 601.601(d)(2)(v)(*d*) (1997). But because "each Revenue Ruling represents the conclusion of the Service as to the application of the law to the entire state of facts involved, taxpayers, Service personnel, and others concerned are cautioned against reaching the same conclusion in other cases unless the facts and circumstances are substantially the same." 26 C.F.R. § 601 (d)(2)(v)(e). The Fund can thus prevail only by identifying a Revenue Ruling awarding an exemption in a case having facts and circumstances "substantially the same" as this case. Examining the relevant Revenue Rulings carefully, we find no such controlling authority.

The Service has issued fifteen Revenue Rulings under section 501(c)(5). *See Stichting Pensioenfonds*, 950 F. Supp. at 378 nn.2-3 (citing the Rulings). Eleven deal with organizations completely controlled by unions and thus do not involve facts and circumstances substantially similar to those in this case. Of the four that concern jointly controlled organizations, three award tax exemptions, but none of the organizations covered by those rulings is substantially similar to the Fund. *See* Rev. Rul. 78-42, 1978-1 C.B. 158; Rev. Rul 75-473, 1975-2 C.B. 213; Rev. Rul, 59-6, 1959-1 C.B. 121. To begin with, the organizations do not provide pension benefits. Rulings 78-42 and 59-6 deal with apprenticeship committees that provide training and education to employees, while Ruling 75-473 involves a jointly controlled dispatch hall that allocates work assignments to union members and adjudicates grievances over working conditions. Moreover,

the labor organizations that the Service found exempt in these three rulings focus primarily on improving employee conditions *on the job*, while the Fund has as its purpose improving employee benefits *after the job*, *i.e.*, pension benefits. The three Rulings also differ from this case because none involves organizations governed by foreign law. Simply because the Service has awarded tax exemptions to labor organizations dually controlled under American law does not mean that it would necessarily have to reach the same conclusion for organizations dually controlled under foreign law, particularly since exempting foreign pension plans means that their earnings will escape all U.S. taxation. Earnings of exempt domestic funds, by comparison, are taxed when benefits are paid to recipients.

The Fund argues that it should receive an exemption because it conducts appropriate labor organization activities. That an organization performs activities "appropriate" to labor organizations, however, does not make it a labor organization under these Revenue Rulings. The Service has said only that a labor organization not itself a labor union that engages in appropriate labor union activities "may" qualify for an exemption. Rev. Rul 75-473. The Service does not end its inquiry upon finding that the organization carries out an "appropriate" union activity. Instead, the Service examines the specific facts of each case, looking to other factors such as the organization's purpose, *see* Rev. Rul. 78-42; Rev. Rul. 59-6, and the nexus between the organization's activities and the parent labor union's objectives, *see* Rev. Rul. 75-473. Although providing and administering pension plans for workers is certainly an appropriate and traditional union function, we find no basis for an exemption in this case because the Revenue Rulings do not unambiguously stand for the proposition that any organization bearing some connection to a traditional labor union and performing appropriate or traditional union functions is necessarily an exempt labor organization.

The fourth Revenue Ruling dealing with a jointly controlled labor organization casts even more doubt on the Fund's claim. Rev. Rul. 77-46, 1977-1 C.B. 147. In that Ruling, the Service denied an exemption to an organization that withheld money from union members' pay and invested it, later paying it back annually with interest. Although the Fund argues, perhaps correctly, that this kind of savings plan differs from a pension plan, the Fund's claim for an exemption still ultimately rests on inference and implication rather than unambiguous authority.

The Fund also relies heavily on several General Counsel Memoranda. These "GCMs," however, have no precedential value. *See Disabled American Veterans v. Commissioner*, 942 F.2d 309, 315 n.5 (6th Cir. 1991) (rejecting reliance on GCMs on the grounds that "[s]uch informal, unpublished opinions of attorneys within the IRS are of no precedential value"); *Old Harbor Native Corp. v. Commissioner*, 104 T.C. 191, 206-07 (1995) ("[A] general counsel memorandum is not binding precedent on this Court."). They therefore cannot provide a basis for the Fund's claim.

The Fund has failed to meet its heavy burden of demonstrating unambiguous entitlement to tax-exempt status. We find nothing in the Code, the regulation, or the Revenue Rulings that even comes close to stating that a jointly controlled pension plan governed by foreign law is a labor organization exempt from federal taxation. Our doubts about the Fund's entitlement to tax-exempt status are not even "nicely balanced."

We recognize that in *Morganbesser v. United States*, 984 F.2d 560 (2d Cir. 1993), the Second Circuit, with one judge dissenting, held that a jointly controlled pension fund is entitled to tax-exempt status under section 501(c)(5). Unlike this case, however, *Morganbesser* involved a

pension fund organized under U.S. law. The Second Circuit, moreover, relied on the precedentially dubious GCMs, never mentioning or applying the "unambiguous" standard that we find controlling. In any event, the Treasury Department has now promulgated a regulation providing that "[a]n organization is not an organization described in section 501(c)(5) if the principal activity of the organization is to receive, hold, invest, disburse, or otherwise manage funds associated with . . . pension or other retirement savings plans or programs." 62 Fed. Reg. 40,447, 40,449 (1997) (adding proposed 26 C.F.R. § 1.501(c)(5)-1(b)(1)). Although both parties agree that this purely prospective regulation has no relevance to the case before us, we mention it to point out that *Morganbesser* had a brief life.

III

We turn finally to the Fund's argument that even if not entitled to an exemption under section 501(c)(5); it should have received a refund pursuant to section 7805(b) of the Code, which gives the Service discretion to apply its rulings retroactively. *See* 26 U.S.C. § 7805(b). The Fund cites *IBM v. United States*, 343 F.2d 914 (Ct. Cl. 1965). After the Service granted Remington Rand, a direct IBM competitor, an excise tax exemption for its Univac computers, IBM applied for a similar ruling for its competing computer. Several years later, the Service denied IBM's request, at the same time revoking Remington's exemption. Invoking section 7805(b), the court held that the Service had abused its discretion by taxing IBM but not Remington in the years prior to the revocation of Remington's exemption. *Id.* at 923. Relying on this decision, the Fund argues that because the Service has exempted two similarly situated British pension funds in private determination letters, it likewise abused its discretion

by failing to give the Fund a refund for the period in question, *i.e.*, 1993. We disagree.

To begin with, *IBM* applies only to direct competitors. In its very first sentence, the court stressed the competitive relationship between IBM and Remington Rand: "International Business Machines Corporation . . . and Remington Rand were, in the years 1951-1958, the two competitors in the manufacture, sale, and leasing of larger electronic computing systems." *Id.* at 915-16. Treating direct competitors similarly for tax purposes, the court emphasized, "is peculiarly essential to free and fair competition," *Id.* at 923; *see also Id.* at 921 n.8 (noting that IBM and Remington "were the only two competitors as to the type of devices involved in the Service's rulings"); *Id.* at 923 (indicating that the Service's treatment "favor[ed] the other competitor so sharply that fairness called upon the Commissioner . . . to establish a greater measure of equality"). In view of this language, courts interpreting *IBM* have limited it to cases involving direct competitors. *See, e.g., Wilson v. United States*, 588 F.2d 1168, 1172 (6th Cir. 1978) (characterizing *IBM* as applying to Service regulations or rulings that "would lead to inequality of treatment between competitor taxpayers"); *Anderson, Clayton & Co. v. United States*, 562 F.2d 972, 981 (5th Cir. 1977) (same). Because the Fund does not allege — as of course it could not — that it competes with the two exempt British funds, *IBM* has no applicability to this case.

We also doubt that section 7805 even applies here. By its terms, section 7805 only applies to a decision by the Service to limit the retroactive effect of a ruling. Here, the Service has simply denied a refund, taking no action whatsoever with respect to retroactivity. Moreover, neither the plain language of section 7805 nor any of the cases that the Fund cites stands for the proposition that once the Service has treated one taxpayer a certain way, it must

thereafter treat every similarly situated taxpayer exactly the same way. In fact, to the extent that Treasury's new regulation denying section 501(c)(5) tax-exempt status to pension funds, *supra* at 8-9, represents a repudiation of the Service's previous decision to exempt the British funds, nothing requires the Service to perpetuate its original error by granting the same mistaken exemption to other taxpayers. *See Sirbo Holdings, Inc. v. Commissioner of Internal Revenue*, 509 F.2d 1220, 1222 (2d Cir. 1975) ("While even-handed treatment should be the Commissioner's goal . . . [t]he making of an error in one case, if error it was, gives other taxpayers no right to its perpetuation.").

We affirm the district court's grant of summary judgment for the United States.

So ordered.

A-13

STICHTING PENSIOENFONDS VOOR DE GEZONDHEID, GEESTELIJKE EN MAATSCHAPPELIJKE BELANGEN, Plaintiff,

v.

UNITED STATES of America, Defendant.

Civil Action No. 95-01568 (CRR).

United States District Court,
District of Columbia.

Dec. 9, 1996.

K. Peter Schmidt, Philip W. Horton and Michelle B. O'Connor, Arnold & Porter, Washington, DC, for Plaintiff.

Stuart D. Gibson, and Samuel A. Mitchell, Trial Attorneys, Tax Division, United States Department of Justice, for Defendant.

MEMORANDUM OPINION

CHARLES R. RICHEY, District Judge.

The plaintiff in the above-entitled case, Stichting Pensioenfonds Voor De Gezondheid, Geestelijke En Maatschappelijke Belangen ("Health Worker's Fund" or the "Fund"), brought this action for a refund of taxes pursuant to Internal Revenue Code ("I.R.C.") § 7422 and 28 U.S.C. § 1346 paid for the taxable year 1993. The sole issue in dispute is whether the plaintiff is exempt from taxation for income earned in 1993 because it qualifies as a "labor organization" under I.R.C. § 501(c)(5). Currently pending before the Court are the parties' cross motions for summary judgment. Upon consideration thereof, the parties' oppositions thereto, the entire record in this case, and for the reasons set forth below, the Court shall deny the plaintiff's

Motion for Summary Judgment, and shall grant the defendant's Motion for Summary Judgment.

BACKGROUND

In this action, the Health Worker's Fund, a Dutch multiemployer pension plan for health care workers, seeks a refund of 1993 U.S. income taxes in the approximate amount of $8.5 million, on the basis of its asserted exemption from U.S. income taxes under § 501(c)(5) of the Internal Revenue Code of 1986, as amended.

The Fund was formed in June, 1969 as a result of negotiations between the Dutch National Hospital Employers' Association ("Hospital Association") and the three principal labor unions representing workers in the hospital industry (the "Unions"). At that time, the Association and the Unions adopted the Fund's articles of association, which established overall control of the Fund by a Board of Directors. Later that same year, the Association and the Unions jointly filed an application with the Dutch Minister of Social Affairs and Employment for compulsory treatment—requiring participation in a pension fund by all employers and employees in a defined industry or industry sector— which was granted. As of December 31, 1993, there were fourteen health and social welfare sectors subject to compulsory treatment under the Fund.

The Fund collects pension fund contributions, which are paid by both employers and employees (although the employee share is collected from employers, who withhold such contributions from the workers' pay); manages its investments; and pays benefits to those participants who are entitled to receive them. The Funds investments include common stocks of United States companies and mutual

funds, which are held by United States banks and other financial institutions acting as custodians for the Fund. For the 1993 taxable year, such custodial institutions timely withheld and paid to the U.S. Treasury $8,567,408.87 in U.S. income taxes on dividends paid on stocks and mutual funds held by such institutions for the Fund.

The Fund is governed by a Board of Directors, which has the ultimate responsibility for the management of the Fund and for setting Fund policy. The Board has twelve voting directors. As required by Dutch law, half the voting directors are appointed by the three principal employer organizations representing employer institutions in the relevant industry sectors, and half are appointed by the three principal unions representing employees in the relevant industry sectors. All twelve directors have equal voting power. There is an independent non-voting Chairman. On all policy issues, the employer and union directors must reach an agreement, or no decision can be made by the Board.

DISCUSSION

I. SUMMARY JUDGMENT IS APPROPRIATE BECAUSE THERE IS NO GENUINE ISSUE AS TO ANY MATERIAL FACT.

In order for the Court to grant summary judgment under Rule 56, the moving party must demonstrate that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553-54, 91 L.Ed.2d 265 (1986). In determining if summary judgment is appropriate, the Court must view all of the evidence in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). That

party, however, "must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* at 586, 106 S.Ct. at 1356. If no rational fact finder could find in the non-movant's favor, there is no material issue of fact and summary judgment is appropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S.Ct. 2505, 2511-12, 91 L.Ed.2d 202 (1986).

In this case, there are no material facts in dispute. By their Stipulation, filed with this Court on May 15, 1996, the parties have expressly stipulated to virtually all material facts. The remaining material facts, not set forth in the Stipulation, are not in dispute either. Therefore, because only matters involving issues of law are in dispute, summary judgment is appropriate.

II. THE FUND IS NOT ENTITLED TO A REFUND FOR INCOME TAXES PAID FOR THE TAXABLE YEAR 1993 BECAUSE IT DOES NOT QUALIFY AS A LABOR ORGANIZATION UNDER I.R.C. § 501(c)(5).

[1] The Fund is not entitled to a refund of the income taxes it paid for 1993 because it has failed to prove unambiguously that it qualifies for the tax exemption as a "labor organization" under § 501(c)(5), which is the only basis it has asserted for a tax exemption. *See United States v. Wells Fargo Bank*, 485 U.S. 351, 354, 108 S.Ct. 1179, 1181-82, 99 L.Ed.2d 368 (1988) (holding that organization must prove "unambiguously" that it qualifies for a tax exemption).

A. The Language and Legislative History of § 501(c)(5) Does Not Suggest That the Plaintiff Qualifies for Exemption as a "Labor Organization."

Section 501(c)(5) of the Internal Revenue Code exempts labor organizations from taxation. The statute itself, though, does not provide a definition for the term "labor organization," and, therefore, the Court must look beyond the plain language of § 501(c)(5) to determine whether the Fund is a labor organization as that term is understood under § 501(c)(5).

Neither does the legislative history of § 501(c)(5) and other relevant tax statutes provide the Court much help in determining a useful definition of labor organizations for purposes of applying § 501(c)(5). Congress first exempted labor organizations from the general corporate tax levied by the Tariff Act of 1909. Tariff Act of 1909, ch. 6, § 38, 36 Stat. 113. The phrase "labor organization" was included in the bill sent to the Senate Finance Committee, but the bill emerged from committee without it. 44 Cong. Rec. 4148 (1909). The committee found the phrase to be unnecessary,

because labor organizations were believed to be covered by the wording "fraternal beneficiary societies, ... operating under the lodge system and providing for the payment of life, sick, accident, and other benefits." 44 Cong.Rec. at 4148-49.

Several labor unions, however, were concerned that the existing "beneficiary societies" language did not cover them since they did not provide life, sick, accident, and other benefits to their members. *See, e.g.*, 44 Cong. Rec. at 4154 (concern of the Brotherhood of Local Firemen that their organization would not be exempt). The phrase "labor organization" consequently was added to the statute to cover organizations that do not "make such provisions, and are not organized for those purposes." 44 Cong.Rec. at 4155. When the first income tax was instituted in 1913 under the Sixteenth Amendment, the phrase "labor organizations" was included with exempt entities. Tariff Act of 1913, ch. 16, § II(G), 38 Stat. 172. This language has remained unchanged in every major revision since that time. *See* J. Thomas Nolan, *Can a Pension Plan be a Labor Organization*, 47 Tax Law. 501, 512 n. 20.

While far from determinative, this legislative history provides no support for the Fund's claim that the phrase "labor organization" encompasses a pension fund that exists only to provide retirement benefits for its members. In fact, the legislative history shows that the term "labor organizations" was added to the 1909 Tariff Act to cover entities that did not provide monetary benefits, but served other functions concerning the welfare of workers. The drafters more likely found that the provision of monetary benefits was not a defining function of a labor organization, but, rather, was an activity engaged in by some labor organizations and not by others. On the other hand, the legislative history equally fails to prove that an association which only provides monetary benefits to its members cannot be a tax-exempt labor organization. The legislative

history thus provides little help in defining "labor organizations."

B. The Regulation Promulgated by the IRS Under § 501(c)(5) Does Not Support the Plaintiff's Claim That it is a Tax-exempt Labor Organization.

The regulation promulgated by the IRS under this statute provides a brief description of a labor organization. It states:

The organizations contemplated by section 501(c)(5) as entitled to exemption from income taxation are those which:

> (1) Have no net earnings inuring to the benefit of any member, and
>
> (2) Have as their objects the betterment of conditions of those engaged in such pursuits, the improvement of the grade of their products, and the development of a higher degree of efficiency in their respective occupations.

Treas. Reg. § 1.501(c)(5)-1(a). While traditional labor unions clearly fall within this definition, it much less clear which non-union entities constitute labor organizations under this regulation.

In this case, the "inurement" requirement of paragraph (1) is satisfied by the Fund because payments do not discriminate between similarly situated employees.[1] The

---

[1] The "inurement" requirement is satisfied by a retirement or other benefit plan as long as payments do not discriminate between similarly situated employees. Treas. Reg. § 1.501(c)(9)-4.

Court concludes, however, that the plaintiff has not shown that it meets the requirements of paragraph (2) of the regulation. The clauses within paragraph (2) are connected by an "and," which instructs that all three characteristics must be true of an organization in order to be found as a labor organization.

While the Fund, in providing retirement benefits, has as its object the betterment of the conditions of the employees, it does not have as its object the improvement of the grade of their products, nor the development of a higher degree of efficiency. In fact, the Fund has no authority to represent employees in the collective bargaining process, but, rather, has the limited authority to invest and manage the available funds to ensure the solvency of the pension fund, and to pay benefits to its members according to the rules governing it. Therefore, the regulation, on its face, excludes the Fund from classification as a tax-exempt labor organization.

C. The Court Declines to Follow Case Law Supporting the Plaintiff's Claim That It Qualifies as a Tax-exempt Labor Organization.

The plaintiff asserts that the decisions in two analogous cases support its claim that it is a tax-exempt labor organization. The first decision is *Morganbesser v. United States*, 984 F.2d 560 (2d Cir.1993). The second decision is a Report and Recommendation of United States Magistrate Judge Karol in the pending case, *Tupper v. United States*, 1996 WL 741565, 1996 U.S. Dist. LEXIS 15806 (D.Mass.1996). Because the Report and Recommendation in Tupper faithfully adopts the analysis in *Morganbesser* and, as a pending Report and Recommendation, is considerably less persuasive authority, the Court will only examine the

decision in *Morganbesser* in evaluating the plaintiff's argument.

1. The *Morganbesser* decision.

In *Morganbesser*, the United States Court of Appeals for the Second Circuit held that a local union's pension trust qualified as a tax-exempt labor organization under § 501(c)(5). *Id.* at 561. The pension plan was established in 1958 as a result of a collective bargaining agreement between the union and a number of construction firms and was funded solely by employers. *Id.* at 561-62. Before ERISA was enacted, the trust was granted an exemption by the IRS as a qualified pension plan. Although it made various amendments between 1976 and 1984, it never requested another determination letter from the IRS until 1984, at which time the IRS determined that the trust did not meet certain ERISA requirements and, therefore, was not qualified for the 1983 tax year. The trust counterargued that even if the trust was not tax-qualified under the ERISA provisions of the Tax Code, it should be tax-exempt as a "labor organization" under § 501(c)(5).

The IRS argued that a pension plan cannot by definition be a labor organization. *Id.* at 563. The court disagreed. Although there was no case law on point, the court found a number of IRS General Counsel Memoranda ("GCMs") instructive, although not precedential. In GCM 35862 (June 20, 1974) the IRS stated that a pension plan is an integral part of a union's activities and an appropriate labor organization undertaking. Citing to GCM 37942 (April 27, 1979) and 37726 (October 20, 1978), the court further noted that the fact that the trust is employer-funded would not affect its status as a labor organization. *Id.* at 563-64.

The court also rejected the IRS's argument that the trust could not be a labor organization because it was jointly

administered by employers and employees. *Id.* The court cited to a number of revenue rulings (Rev. Rul. 59-6, 1959-1 C.B. 121; Rev. Rul. 75-473, 1975-2 C.B. 213) in which the IRS allowed entities which carry out the function of a labor organization and which are jointly administered by employers and employees to qualify as labor organizations.

In a dissenting opinion, Judge Minor raised the concern that if an entity established to pay retirement benefits could obtain an exemption as a labor organization under § 501(c)(5) of the Code rather than under the ERISA provision, § 401(a), there would be little reason for plans to comply with the more stringent requirements of ERISA, and the congressional scheme for pension benefits might fail. *Id.* at 566 (Minor, J., dissenting). Judge Minor also concluded that the majority had misinterpreted the GCMs and Revenue Rulings.

2. The Court disagrees with the United States Court of Appeals' decision in *Morganbesser* and, therefore, does not find that decision as persuasive authority supporting the plaintiff's claim that it is a tax-exempt labor organization under § 501(C)(5).

For the reasons set forth below, this Court finds the majority's analysis in *Morganbesser* unpersuasive and, not being bound by that decision, it will not adopt its ruling. In that case, the court relied on *Portland Co-operative Labor Temple Ass'n v. Commissioner*, 39 B.T.A. 450, 1939 WL 159 (1939), a number of GCMs, which have no precedential value, and certain revenue rulings. This Court agrees with Judge Minor's criticism that the court took that authority out of context, and applied it inconsistently with its ruling.

a. Portland Cooperative Labor Temple v. Commissioner

The court in *Morganbesser* found the language of the Board of Tax Appeals in *Portland Co-operative* that the term "labor organization" "bespeaks a liberal construction" supported a broad definition of that term embracing the trust in *Morganbesser*. The court, however, ignored the language immediately following the quoted words. The Board in *Portland Co-operative* held that a liberal construction is to be given to the term "labor organization" in order "to embrace the common acceptation of the term." 39 B.T.A. at 454-55 (emphasis added). Organizations independent from labor unions whose sole purpose is to manage and distribute retirement funds do not fall within the common definition of labor organizations.

When the term was first introduced into federal tax law in the Payne-Aldrich Tariff Act of 1909, ch. 6, 36 Stat. 112, "labor organizations" were defined as "a combination of workmen usually (but not necessarily) of the same trade, or of several allied trades, for the purpose of securing by united action the most favorable conditions as regards wages, hours of labor, etc., for its members." *See* Oakes, *Organized Labor and Industrial Conflicts* (1927) at 3; *see also Stone v. Textile Examiners & Shrinkers Employers' Assoc.*, 137 A.D. 655, 122 N.Y.S. 460 (1910); Black's Law Dictionary 874-75 (6th ed. 1990) ("A combination of workers usually, but not necessarily, of the same trade or of several allied trades, for securing by united action, the most favorable conditions as regards wages, hours of labor, etc., for its members.").

A labor organization "must have authority to represent or speak for its members in matters relating to their employment, such as wages, hours of labor, conditions, or economic benefits." *See* Hopkins, *The Law of Tax-Exempt Organizations* (6th ed. 1992) at 617. Thus, even if the Fund

was a tax-exempt labor organization, *Portland Co-operative* is not the authority that supports such a conclusion. The holding there merely was that the term "labor organization" should be construed liberally to embrace its common acceptation of the term. An organization, such as the Fund, that fulfills no representational role on behalf of labor nor is controlled by such an organization does not fall within the common understanding of the term "labor organization." Thus, this Court finds that *Portland Co-operative* does not support the Court of Appeals' conclusions in *Morganbesser* or the plaintiff's argument in this case.

b. Revenue Rulings

Both the court in *Morganbesser* and the plaintiff here rely on Revenue Rulings 75-473 and 59-6, noting that the organizations at issue in those rulings were determined to be labor organizations even though they were jointly administered by employers and employees. The Court concluded from interpreting the revenue rulings that the provision of retirement benefits is a suitable undertaking for a labor organization, and neither employer funding nor joint labor-management control operates to defeat classification as a labor organization.

A more careful analysis of the rulings, however, reaches a different conclusion. The IRS had issued fifteen revenue rulings addressing § 501(c)(5) labor organizations when *Morganbesser* was decided. For the seven rulings in which an organization provided traditional labor union services such as collective bargaining representation or apprenticeship training, the IRS ruled that the organizations were tax-exempt.[2] When the organization does not provide

---

[2] Rev. Rul. 75-288, 1975-2 C.B. 212; Rev. Rul. 75-473, 1975-2 C.B. 213; Rev. Rul. 76-31, 1976-1 C.B. 157; Rev. Rul. 77-5, 1977-1 C.B.

labor representation, the revenue rulings suggest a twofold inquiry: first, are the organization's activities appropriate undertakings, and second, if so, is the organization controlled and funded by an exempt labor organization?[3] Importantly, among those organizations satisfying the first part of the test, only those that were entirely controlled and funded by an organization that is itself classified as tax-exempt under § 501(c)(5) were ruled tax-exempt. *See* J. Thomas Nolan, *Can a Pension Plan Be a Labor Organization?*, 47 Tax Lawyer at 505-07.

The Fund in this case does not provide labor representation and, thus, falls into the second category of organizations. Although the Fund's activities are appropriate undertakings for a labor organization, it is neither controlled nor funded by an exempt labor organization. Consequently, under a more faithful interpretation of the revenue rulings than that given by the court in *Morganbesser*, the Fund should not be ruled tax-exempt.

c. General Counsel Memoranda

The court in *Morganbesser* concluded that the nexus between the trust and labor union in that case was "crucial" in showing the trust was a labor organization. 984 F.2d at 563. The Court relied on three GCMs to support the

---

145; Rev. Rul. 77-154, 1977-1 C.B. 148; Rev. Rul. 59-6, 1959-1 C.B. 121; Rev. Rul. 78-42, 1978-1 C.B. 158.

3 Rev. Rul. 74-596, 1974-2 C.B. 167 (providing litigation costs); Rev. Rul. 67-7, 1967-1 C.B. 137 (providing strike benefits); Rev. Rul. 62-17, 1962 C.B. 87 (providing death and accident benefits); Rev. Rul. 68-534, 1968-2 C.B. 217 (operating a newspaper); Rev. Rul. 69-386, 1969-2 C.B. 123 (running a trade or business); Rev. Rul. 72-391, 1972-2 C.B. 249 (operating an employment agency); Rev. Rul. 77-46, 1977-1 C.B. 147 (providing a savings plan); Rev. Rul. 76-420, 1976-2 C.B. 153 (providing strike benefits).

significance it placed on the nexus. The dissent read the same three GCMs as calling for the opposite conclusion.

The majority principally relied upon GCM 37942, quoting the following passage:

> [W]e have always considered it significant that the organization was in some way connected with more traditional types of labor organizations.... [W]e think one of the most reliable indicators of a "labor organization" is that it is ... formed as a result of ... representation [of a union], or is connected with or supplements or supports in some way organizations which do perform that role.

Id. (*quoting* GCM 37942 (April 27, 1979) (citations omitted)). Because the trust in *Morganbesser* was formed as a result of a collective bargaining agreement negotiated by the union to supplement the function of the union in providing employees' pension benefits, the court found that it met the test set forth in GCM 37942. *Id.* The *Morganbesser* dissent, however, argued that there could be no such connection with a traditional labor organization where "a pension plan is funded totally by employers, is not controlled by a labor union but by an independent board of trustees composed of an equal number of employer and union representatives and does not support or supplement the union in any way." *Id.* at 566 (Minor, J., dissenting). The dissent further pointed out that in GCM 37942, the General Counsel actually determined that the pension plan, which "provid[ed] only monetary benefits, and perform[ed] no other labor activities, and which lack[ed] the connection" deemed necessary in the GCM did not qualify for tax exemption under § 501(c)(5). *Id.* at 565.

The court also relied on GCM 35862, which concerned a union pension plan trust, funded by mandatory employee contributions and controlled by a bank, but later by a union committee. A supplement to the GCM stated that even when controlled by the bank and not the labor union, the trust was a tax-exempt labor organization. The supplement further stated that it was not necessary for the labor organization's activities to be an integral part of the union activities and that it was sufficient "that the organization be engaged in activities appropriate to an exempt labor union for it to qualify for exemption under Section 501(c)(5)." GCM 35862 (June 20, 1974) at *12. However, a revenue ruling proposed to reflect the views set forth in the supplement never was adopted. *Morganbesser*, 984 F.2d at 565 (Minor, J., dissenting). Rather, the question raised in the GCM 35862 was resolved in the later-issued GCM 37942, which provides:

> Although in the supplement to G.C.M. 35862, we stated that it was not advisable to require that a labor organization's activities be "an integral part of the activities of a labor union," we did not intend to suggest by that statement that no connection of any kind with more traditional labor organizations was required.

GCM 37942 at *22. Thus, GCM 35862 and 37942, at best, beg the question of what kind of connection with more traditional labor organizations is necessary for a pension fund controlled by an independent board of directors to qualify for tax exemption.

The court in *Morganbesser* also relied on GCM 37726, which stated that a labor union's administrative fund, established pursuant to a collective bargaining agreement, funded through employer contributions, whose trustees were all labor union representatives, was not "precluded from [§ 501(c)(5)] exemption solely because they are joint

labor-management undertakings or because their revenues in certain circumstances are derived from industry sources." The fund in that case, however, was controlled by a labor union and, ultimately, was granted exemption under the unrelated § 501(c)(9).

Because the authority upon which the court in *Morganbesser* relied is unpersuasive, this Court will not adopt the ruling in that case and finds that the Court of Appeal's decision does not lead this Court to the conclusion that the Fund in this case qualifies as a tax-exempt organization.

D. The Fund Does Not Have a Sufficient Nexus With a More Traditional Labor Organization to Qualify as a Tax-exempt Labor Organization Itself Under § 501(c)(5).

Based on its own understanding of the aforementioned revenue rulings and GCMs, which is consonant with Judge Minor's dissent, and upon consideration of the entire record herein, the Court concludes that the Fund does not have a sufficient nexus with a more traditional labor organization to qualify as a tax-exempt labor organization itself. The Fund is controlled by an independent Board of Directors, half of whose members are appointed by labor unions and half by employers, and does not represent the interests of the labor organizations that appointed its directors. In fact, the directors of the Fund, whether appointed by labor or employer interests, owe a fiduciary duty to the Fund beneficiaries and must act in their best interest, even if those interests conflict with the organization that appointed them.[4] *See National Labor*

---

4 The plaintiff points to three specific incidents in which the Fund was engaging in activities involving labor issues, and proffers other evidence that the Fund represents the interests of labor. *See* Plaintiff's

Relations Board v. Amax Coal Co., 453 U.S. 322, 331-32, 101 S.Ct. 2789, 2795-96, 69 L.Ed.2d 672 (1981) (holding that a management-appointed trustee to a multi-employer pension plan could not be considered a management representative). Thus, in light of the holding in *Amax Coal*, this Court will not assign any significance to the fact that labor unions appointed half of the Fund's directors. *See Second Circuit Holds Multiemployer Pension Plan Exempt as Labor Organization*, 2 No. 1 ERISA Litig. Rep. 15 (1993). Because the Fund is neither controlled by nor represents the interests of traditional labor organizations, the Court holds that there is not an adequate nexus between the Fund and another tax-exempt labor organization for the Fund to qualify as a tax-exempt labor organization under § 501(c)(5).

E. Allowing Retirement Plans With Few Connections to Traditional Labor Organizations to Qualify for Tax Exemption as Labor Organizations Would Undermine the Legislative Intent of ERISA.

Judge Minor and the IRS have argued that granting exemptions to independent employee-funded retirement funds under § 501(c)(5) undermines the legislative intent of ERISA and opens the floodgates to pension plans wishing to

---

Memorandum in Support of Motion for Summary Judgment ("Plaintiff's Memorandum") 32-39. The record shows, however, that in each incident the Fund was acting either in response to judicial mandates or in furtherance of its beneficiaries, and clearly took into account the interests of employers equally with those of employees and labor groups. *See* Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment 10-15. It is apparent from the undisputed facts that any activities engaged in by the Fund involving labor issues arise from its duties to its beneficiaries, not from any loyalty or connection with labor unions.

avoid § 401(a) requirements while still retaining tax exemption. The *Morganbesser* majority and the plaintiff here dismiss this argument, asserting that an exemption under § 401(a) is still more favorable than an exemption under § 501(c)(5), and, thus, tax-exemption under § 501(c)(5) will not induce plans to avoid the rigorous requirements under ERISA.

The Court agrees that an exemption under § 401(a) is more favorable than an exemption under § 501(c)(5). Where a plan fails to qualify for an ERISA exemption, an employer may not immediately deduct its contributions and employees must immediately report contributions made on their behalf as income. *See* I.R.C. §§ 402(b), 404(a). The loss of those advantages when a plan does not comply with ERISA, however, is felt by the beneficiaries and the employer. There is no enforcement tool applicable to the plan itself if an exemption under § 501(c)(5) is allowed for such plans. *Morganbesser*, 984 F.2d at 567 (Minor, J., dissenting). The Court agrees with the *Morganbesser* dissent that Congress most likely did not seek to establish the weaker set of inducements for compliance with ERISA. ERISA is a proactive statute designed to encourage plans to adopt its rigorous requirements. If the Tax Code allows the § 501(c)(5) exemption for employer-funded plans, the plans may purposefully discriminate among employees, or fail in other ways to qualify under § 401(a), and still realize tremendous benefits as a tax-exempt organization. In discrimination cases, especially, sheltering retirement plans behind § 501(c)(5) frustrates congressional intent, and should not be permitted.[5]

---

[5] The plaintiff argues that the issue of an "end run" on ERISA is simply not present here since the Fund, as a foreign pension fund, is not expected to comply with ERISA, but with Dutch pension laws. However, the fact that ERISA does not apply to the Fund in this case is

III. THE DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT AS TO COUNT II BECAUSE THE PLAINTIFF IS NOT ENTITLED TO RETROACTIVE EXEMPTION PURSUANT TO I.R.C. § 7805(b).

[2] In Count II of its Complaint, the plaintiff alleges that, even if the Court determines it is not a tax exempt "labor organization," it is entitled to retroactive exemption under § 501(c)(5) pursuant to discretion granted the IRS under I.R.C. § 7805(b). Relying on *IBM v. United States*, 343 F.2d 914 (Ct.Cl.1965), the plaintiff argues that since the IRS has granted favorable § 501(c)(5) determinations to other, similarly situated foreign pension funds, it would be an abuse of discretion under § 7805(b) to deny the same treatment to the Fund for the period in question. Plaintiff's Memorandum at 39. The plaintiff alleges that the IRS has issued favorable exemption rulings to two British pension funds to which the Fund claims it is similarly situated. According to the plaintiff's argument, the IRS must accord the Fund identical treatment.

The plaintiff invokes *Automobile Club of Michigan v. Commissioner*, 353 U.S. 180, 184, 77 S.Ct. 707, 709-10, 1 L.Ed.2d 746 (1957), in support of its argument. In that case, the Court determined that "the Commissioner, having dealt with petitioner upon the same basis as other automobile clubs, did not abuse his discretion." The plaintiff argues that the corollary to that rule is that "unequal treatment in applying section 7805(b) would constitute an abuse of discretion." Plaintiff's Memorandum at 40.

---

of no consequence to this discussion. The Court is seeking to discern whether congressional intention was as the IRS asserts, not whether the concerns of the IRS or Judge Minor in *Morganbesser* are compelling under the facts in this case.

This claim fails to withstand scrutiny. First, the court has considerable doubt that the British Navy Funds are similarly situated to the Dutch fund here. Resolution of this issue, however, is not appropriate on summary judgment. Assuming, arguendo, that the British Funds are similarly situated, the plaintiff's claim still fails. The defendant has submitted ample authority that the Commissioner's acquiescence in an erroneous decision, published as a ruling, cannot in and of itself bar the United States from collecting a tax otherwise lawfully due. *Dixon v. United States*, 381 U.S. 68, 73, 85 S.Ct. 1301, 1304-05, 14 L.Ed.2d 223 (1965) (decided days after the Court of Claims decision *in IBM v. United States*). The IRS may change its position retroactively to correct a mistake of law. The Court of Claims has even rejected the *IBM* rule. In two later 1965 decisions, the Claims Court held that a taxpayer who relied upon a private letter ruling issued to another taxpayer was not entitled to relief from the Commissioner's decision to revoke those rulings retroactively. *Bornstein v. United States*, 345 F.2d 558, 563-64 (Ct.Cl.1965); *Knetsch v. United States*, 348 F.2d 932, 940 (Ct.Cl.1965), *cert. denied*, 383 U.S. 957, 86 S.Ct. 1221, 16 L.Ed.2d 300 (1966).[6]

CONCLUSION

For the foregoing reasons, the Court concludes that based upon the undisputed facts, the plaintiff is not entitled to a refund of taxes paid for 1993 because it does not qualify as a tax exempt "labor organization" under I.R.C. § 501(c)(5). Furthermore, the plaintiff is not entitled to retroactive exemption under that provision pursuant to I.R.C. § 7805(b). Accordingly, the Court shall deny the plaintiff's Motion for Summary Judgment, and shall grant the

---

[6] These decisions have been codified in I.R.C. § 6110(j), which provides that private rulings may not be cited or relied upon as precedent.

defendant's Motion for Summary Judgment. The Court shall issue an Order of even date herewith consistent with the foregoing Memorandum Opinion.

ORDER

For the reasons set forth in the Court's Memorandum Opinion of even date herewith, it is, by the Court, this 9th day of December, 1996,

ORDERED that the Plaintiff's Motion for Summary Judgment shall be, and hereby is, DENIED; and, it is

FURTHER ORDERED that the Defendant's Motion for Summary Judgment shall be, and hereby is, GRANTED; and, it is

FURTHER ORDERED that the above-captioned case shall be, and hereby is, DISMISSED from the dockets of this Court.

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 97-5006 September Term, 1997
95cv01568

Stichting Pensioenfonds Voor De Gezondheid,
Geestelijke En Maatschappelijke Belangen,
Appellant

v.

United States of America,
Appellee

BEFORE: Edwards, Chief Judge, Ginsburg and Tatel,
Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed December 23, 1997, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: //s//
Robert A. Bonner
Deputy Clerk

Filed: January 23, 1998

INTERNAL REVENUE CODE OF 1986,

AS AMENDED (26 U.S.C.)

Section 501(a)

> An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is derived under section 502 or 503.

Section 501(c)

> The following organizations are referred to in subsection (a)....
>
> (5) Labor, agricultural, or horticultural organizations.

Section 7805(b)[7]

> The secretary may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive affect.

---

[7] Following amendments to this provision, effective after the year at issue, section 7805(b)(8) now reads:

> The secretary may prescribe the extent, if any, to which any ruling (including any judicial decision or any administrative determination other than by regulation) relating to the internal revenue laws shall be applied without retroactive effect.

TREASURY REGULATIONS,

(26 C.F.R.) SECTION 1.501(c)(5)-1(a)

The organizations contemplated by section 501(c)(5) as entitled to exemption from income taxation and those which:

(1) Have no net earnings issuing to the benefit of any member, and

(2) Have as their objects the betterment of the conditions of those engaged in such pursuits, the improvement of the grade of their products, and the development of higher degree of efficiency in their respective occupations.

UNITED STATES-NETHERLANDS CONVENTION FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES AND INCOME (DECEMBER 18, 1992)

Article 28(1)

Nationals of one of the States shall not be subjected in the other State to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances are or may be subjected. This provision shall, notwithstanding the provisions of Article 1 (General Scope), also apply to persons who are not residents of one or both of the States. However, for purposes of the United States tax, a United States national who is not a resident of the United States and a Netherlands national who is not a resident of the United States are not in the same circumstances.

UNITED STATES–NETHERLANDS TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION (DECEMBER 5, 1957)

Article XI(3)

Nationals and companies of either Party shall in no case be subject, within the territories of the other Party, to the payment of taxes, fees or charges imposed upon or applied to income, capital, transactions, activities or any other object, or to requirements with respect to the levy and collection thereof, more burdensome than those borne by nationals, residents and companies of any third country.

FILED
JUN 22 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 97-1734

In the Supreme Court of the United States

OCTOBER TERM, 1997

STICHTING PENSIOENFONDS VOOR DE GEZONDHEID, GEESTELIJKE EN MAATSCHAPPELIJKE BELANGEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
LORETTA C. ARGRETT
Assistant Attorney General
KENNETH L. GREENE
ROBERT W. METZLER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether, prior to the adoption of 26 C.F.R. 1.501(c)-(5)-1(b), the foreign pension fund involved in this case qualified as a tax exempt "labor organization" under 26 U.S.C. 501(c)(5).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 (1970)	12
Anderson Clayton Co. v. *United States*, 562 F.2d 972 (5th Cir. 1977)	10
Bingler v. *Johnson*, 394 U.S. 741 (1969)	6
Bornstein v. *United States*, 345 F.2d 558 (Ct. Cl. 1965)	10
Collins Music Co. v. *United States*, 21 F.3d 1330 (4th Cir. 1994)	10
Costo v. *United States*, 922 F.2d 302 (6th Cir. 1990)	12
Dickman v. *Commissioner*, 465 U.S. 330 (1984)	11
Disabled American Veterans v. *Commissioner*, 942 F.2d 309 (6th Cir. 1991)	7
Dixon v. *United States*, 381 U.S. 68 (1965)	11
Educo, Inc. v. *Alexander*, 557 F.2d 617 (7th Cir. 1977)	10
FDIC v. *Massingill*, 30 F.3d 601 (5th Cir. 1994)	11
Goodstein v. *Commissioner*, 267 F.2d 127 (1st Cir. 1959)	10
Hernandez v. *Commissioner*, 490 U.S. 680 (1989)	7
IBM Corp. v. *United States*, 343 F.2d 914 (Ct. Cl. 1965), cert. denied, 382 U.S. 1028 (1966)	5, 10
Jimmy Swaggart Ministries v. *Board of Equalization*, 493 U.S. 378 (1990)	12
Knetsch v. *United States*, 348 F.2d 932 (Ct. Ct. 1965), cert. denied, 383 U.S. 957 (1966)	10

Cases—Continued: Page

Lawn v. *United States*, 355 U.S. 339 (1958) 12
Matsushita Elec. Indus. Co. v. *Epstein*, 516 U.S. 367 (1996) 12
Minchin v. *Commissioner*, 335 F.2d 30 (2d Cir. 1964) 10
Morganbesser v. *United States*, 984 F.2d 450 (2d Cir. 1993) 4, 8, 9
Oklahoma Tax Commission v. *United States*, 319 U.S. 598 (1943) 6
Old Harbor Native Corp. v. *Commissioner*, 104 T.C. 191 (1995) 7
Seminole Tribe of Florida v. *Florida*, 517 U.S. 44 (1996) 12
Shakespeare Co. v. *United States*, 389 F.2d 772 (Ct. Cl. 1968) 10
Sun Chemical Corp. v. *United States*, 698 F.2d 1203 (Fed. Cir.), cert. denied, 464 U.S. 819 (1983) .. 12
Thrash v. *O'Donnell*, 448 F.2d 886 (5th Cir. 1971) 10
Trotter v. *Tennessee*, 290 U.S. 354 (1933) 6
Tupper v. *United States*, 134 F.2d 444 (1st Cir. 1998) 7
United States v. *Centennial Sav. Bank*, 499 U.S. 573 (1991) 6
United States v. *Felt & Tarrant Mfg. Co.*, 283 U.S. 269 (1931) 11-12
United States v. *Lewis*, 798 F.2d 1250 (9th Cir. 1986) 12
United States v. *Stewart*, 311 U.S. 60 (1940) 6
United States v. *Wells Fargo Bank*, 485 U.S. 351 (1988) 6
United States Trust Co. v. *Helvering*, 307 U.S. 57 (1939) 6
Weller v. *Commissioner*, 270 F.2d 294 (3d Cir. 1959), cert. denied, 364 U.S. 908 (1960) 10

Cases—Continued: Page

Wilson v. *United States*, 588 F.2d 1168 (6th Cir. 1978) 10

Yazoo & Miss. Valley R.R. v. *Thomas*, 132 U.S. 174 (1889) 6, 7

Statutes and regulations:

Internal Revenue Code (26 U.S.C.):

§ 401(a) 8

§ 402 8

§ 501(a) 8

§ 501(c)(5) 3, 4, 6, 9, 11

§ 6110(j)(3) 10

§ 7805(b) 3

26 C.F.R.:

Section 1.501(c)(5)-1(a) 4

Section 1.501(c)(5)-1(a)(2) 6

Section 1.501(c)(5)-1(b) 9

Section 1.501(c)(5)-1(b)(1) 7

Section 601.201(l) 10

Section 601.201(m) 10

Miscellaneous:

62 Fed. Reg. 40,447-40,449 (1997) 9

Mimeograph 71, 1952-2 C.B. 170 8

Rev. Rul. 77-46, 1977-1 C.B. 147 4

S. Rep. No. 1622, 83d Cong., 2d Sess. (1954) 8

I. Goodman, *The Unique Status of Foreign Pensions Offers Tax Advantages*, 11 J. Tax'n 30 (1959) 8-9

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1734

STICHTING PENSIOENFONDS VOOR DE GEZONDHEID, GEESTELIJKE EN MAATSCHAPPELIJKE BELANGEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 129 F.3d 195. The opinion of the district court (Pet. App. A13-A33) is reported at 950 F. Supp. 373.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 1997. The petition for rehearing was denied on January 23, 1998 (Pet. App. A34). The petition for certiorari was filed on April 22, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a Dutch pension fund. All union and non-union employees in the hospital industry in that country are required to participate in that fund (Pet. App. A2). Under its articles of association and Dutch law, half of the members of petitioner's Board of Directors are appointed by organizations that represent employers and half are appointed by unions (*ibid.*). If fewer than all directors are present at a meeting of the Board, each side has only as many votes as the side with the fewer directors present (*id.* at A3). On all policy issues, the employer and union directors must reach an agreement, or no decision can be made by the Board (*ibid.*).

As of December 31, 1993, approximately 1,000,000 people were participants in petitioner's pension fund. Of this total, approximately 73,000 participants were currently retired and receiving pension payments. Approximately 333,000 were individuals who were not accruing benefits through current work but who, based upon past employment, will be entitled to pension benefits on reaching retirement age (Pet. App. A3).

Petitioner collects pension contributions from employers and employees, manages the investment of the contributions and pays benefits to the persons entitled to receive them (Pet. App. A3, A14). Petitioner is located in the Netherlands and does not engage in any trade or business within the United States (*id.* at A2). During 1993, petitioner received substantial income from investments in the United States. Custodial institutions in this country withheld and paid $8,567,408 in federal income tax before distributing

the balance of that income to petitioner (*id.* at A3, A15).

2. Petitioner brought this suit seeking a refund of the withheld taxes, claiming that it qualified as a tax-exempt "labor organization" under Section 501(c)(5) of the Internal Revenue Code, 26 U.S.C. 501(c)(5). The district court concluded, however, that neither the language of Section 501(c)(5), its legislative history nor the relevant regulations support petitioner's claim (Pet. App. A17-A20). The court noted, moreover, that petitioner's contention that a pension plan can qualify for tax-exempt status as a "labor organization" would undermine and circumvent the detailed rules that Congress enacted to govern pension plans in the Employee Retirement Income Security Act (ERISA) (*id.* at A29-A30).

The court also rejected petitioner's alternative argument that it is entitled to be treated as tax exempt under Section 7805(b) of the Code, 26 U.S.C. 7805(b). That statute merely specifies that the Secretary of the Treasury has discretion to determine "the extent, if any, to which any ruling or regulation * * * shall be applied without retroactive effect" (*ibid.*). The court concluded that, even though the Internal Revenue Service had incorrectly issued private rulings to two British pension funds that treated them as exempt from tax as "labor organizations," that did not require the Service to award a similarly incorrect ruling to petitioner (Pet. App. A31-A32).

3. The court of appeals affirmed (Pet. App. A1-A12). The court noted that the decisions of this Court have consistently held that a taxpayer seeking an exemption from tax has the burden of establishing "unambiguously" its entitlement to the exemption (*id.* at A4-A5). The court noted that the Internal Revenue Code

does not define the term "labor organization" in Section 501(c)(5) and that the legislative history also provides no clear guidance (Pet. App. A5). The court further observed that petitioner does not qualify as a "labor organization" as that term is described in the applicable regulation (26 C.F.R. 1.501(c)(5)-1(a)), although the court "decline[d] to decide the case on that basis" (Pet. App. A6). Finding no support for petitioner's claim in the Code or the regulation, the court of appeals looked to the revenue rulings on which petitioner sought to rely. The court noted the well established rule that a taxpayer cannot rely on a revenue ruling unless it is based on "facts and circumstances 'substantially the same' as this case" (*id.* at A7) and concluded that none of the rulings cited by petitioner qualifed under this standard (*id.* at A7-A8). The court pointed out, however, that Rev. Rul. 77-46, 1977-1 C.B. 147, *denied* a tax-exemption to a savings plan that was funded from money withheld from the pay of union members and was jointly controlled by the union and the employer. The court observed that this ruling "casts even more doubt on the Fund's claim" (Pet. App. A9). The court also rejected petitioner's attempt to rely on various General Counsel Memoranda (GCM) which, the court emphasized, were not precedential in character (*ibid.*).

The court of appeals rejected petitioner's efforts to rely on the decision of the Second Circuit in *Morganbesser* v. *United States*, 984 F.2d 560 (1993). The court of appeals held that *Morganbesser* is distinguishable from the present case because that case involved a pension plan organized under United States law (Pet. App. A9-A10). The court pointed out that "exempting foreign pension plans means that their earnings will escape all U.S. taxation" (*id.* at A8); by

contrast, "[e]arnings of exempt domestic funds * * * are taxed when benefits are paid to recipients" (*ibid.*). The court stated, moreover, that it disagreed with the underlying reasoning of *Morganbesser*, which incorrectly "relied on the precedentially dubious GCMs, never mentioning or applying the 'unambiguous' standard that we find controlling" (Pet. App. A10). The court stated, moreover, that, because of recently adopted Treasury regulations, "*Morganbesser* had a brief life" and is no longer prospectively applicable even in the Second Circuit (*ibid.*).

The court of appeals also rejected petitioner's alternative claim that it must be treated as exempt from tax simply because the Internal Revenue Service had issued (and subsequently revoked) private letters to two British pension funds treating them as exempt labor organizations. The court concluded that no statute or other authority stands for the proposition that "once the Service has treated one taxpayer a certain way, it must thereafter treat every similarly situated taxpayer exactly the same" (Pet. App. A11-A12). The court noted that petitioner erred in relying on *IBM Corp.* v. *United States*, 343 F.2d 914 (Ct. Cl. 1965), cert. denied, 382 U.S. 1028 (1966), which involved the particular situation in which different rulings were given to two direct competitors. That case is not relevant here, for petitioner does not compete with the two British pension funds (Pet. App. A11).

ARGUMENT

The decision of the court of appeals is correct and does not directly conflict with any decision of this Court or any other court of appeals. Moreover, because the Treasury has adopted a new regulation that governs this issue for all years after 1995, the ques-

tion presented in this case lacks prospective importance. Further review is therefore not warranted.

1. There is a "settled principle that exemptions from taxation are not to be implied; they must be unambiguously proved." *United States* v. *Wells Fargo Bank*, 485 U.S. 351, 354 (1988). Accord, *United States* v. *Centennial Savings Bank*, 499 U.S. 573, 583 (1991); *Bingler* v. *Johnson*, 394 U.S. 741, 751-752 (1969); *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598, 606 (1943); *United States* v. *Stewart*, 311 U.S. 60, 71 (1940); *United States Trust Co.* v. *Helvering*, 307 U.S. 57, 60 (1939); *Trotter* v. *Tennessee*, 290 U.S. 354, 356 (1933); *Yazoo & Miss. Valley R.R.* v. *Thomas*, 132 U.S. 174, 183 (1889). The court of appeals correctly applied that principle in rejecting petitioner's claim that it was exempt from income tax as a "labor organization" under 26 U.S.C. 501(c)(5). As the court of appeals held (Pet. App. A5-A9), neither the language of the statute, its legislative history nor the governing regulations support petitioner's claim that a pension plan is a "labor organization."[1] See also note 3, *infra*.

---

[1] Petitioner errs in relying (Pet. 20) on 26 C.F.R. 1.501(c)(5)-1(a)(2). That regulation generally sets forth the objects or purposes of all organizations that Congress contemplated as being exempt under Section 501(c)(5). The regulation does not purport to set forth criteria that, if satisfied, conclusively establish that an entity is a labor organization. For example, the fact that an organization may have as one of its purposes "the betterment of the conditions of those engaged in such pursuits" does not establish that the organization is a "labor organization" within the meaning of Section 501(c)(5). Indeed, the Treasury has now clearly specified by regulation that an organization such as petitioner cannot qualify as a "labor organization," for its "principal activity" is management

Petitioner contends (Pet. 15) that the court of appeals erred in relying on the settled principle that exemptions from tax must be established "unambiguously" for the taxpayer to prevail. According to petitioner, that "doctrine * * * would put the litigating positions of the IRS on exemptions beyond judicial review" (*ibid.*). This Court has consistently held, however, that it is the *taxpayer* who must prove that it is entitled to the special treatment that a tax exemption confers, for "taxation is the rule, and exemption the exception." *Yazoo & Miss. Valley R.R.* v. *Thomas*, 132 U.S. at 183. It is, moreover, obvious that this settled principle does not put the government's litigating position beyond judicial review. If the plain language of the statute or (when relevant) its legislative history unambiguously demonstrates that a taxpayer is entitled to an exemption, the government's litigating position would not be immune from review. As the court of appeals pointed out (Pet. App. A4-A9), the problem faced by petitioner is not that the government's interpretation of the statute is "beyond review"—it is that petitioner lacks suitable support for the proposition that a pension plan is a "labor organization."[2]

---

of a "pension or other retirement savings plan[]" (26 C.F.R. 1.501(c)(5)-1(b)(1)). See page 9, *infra*.

[2] Petitioner errs in trying to find support for its exemption claim in GCMs (Pet. 13). As the court of appeals correctly held, those memoranda lack precedential value (Pet. A9). *Tupper* v. *United States*, 134 F.3d 444, 447 (1st Cir. 1998); *Disabled American Veterans* v. *Commissioner*, 942 F.2d 309, 315 n. 5 (6th Cir. 1991); *Old Harbor Native Corp.* v. *Commissioner*, 104 T.C. 191, 206-207 (1995). See also *Hernandez* v. *Commissioner*, 490 U.S. 680, 703 n.13 (1989). Moreover, for the reasons addressed in the briefs in the court of appeals—reasons that the

2. a. Petitioner errs in contending (Pet. 3) that the decision in this case directly conflicts with the decision of the Second Circuit in *Morganbesser* v. *United States*, 984 F.2d 560 (2d Cir. 1993).[3] As the court of appeals explained in this case, "[u]nlike this case, * * * *Morganbesser* involved a pension fund organized under U.S. law" (Pet. App. A9-A10). If a foreign pension plan were treated as a tax-exempt "labor organization," the tax scheme that Congress specifically devised for pension plans in ERISA would be circumvented. Under that scheme, income is exempted at the plan level (26 U.S.C. 401(a), 501(a)) but is taxed when distributed to the plan participant (26 U.S.C. 402). In the case of foreign pension plans, however, the participants are generally non-resident aliens from whom a tax on distribution either is not due or is impossible or impracticable to collect. See Mimeograph 71, 1952-2 C.B. 170; S. Rep. No. 1622, 83d Cong., 2d Sess. 55 (1954); H. R. Rep. No. 1337, 83d Cong., 2d Sess. A151, A166 (1954); I. Goodman, *The Unique Status of Foreign Pensions Offers Tax Advantages*,

---

court of appeals found unnecessary to address—the GCMs are not consistent with petitioner's position in any event.

[3] The court in *Morganbesser* agreed with the court in the present case that neither the language of the statute (984 F.2d at 563), the regulations (*Id.* at 564) nor the case law (*Id.* at 562, 564) establishes that a pension fund is a tax-exempt "labor organization." The *Morganbesser* court erroneously concluded, however, that the "only real guidance for what qualifies as a labor organization is found in the GCMs issued by the IRS." *Id.* at 564. As the court of appeals held in this case (Pet. App. A9-A10), the inferences drawn in *Morganbesser* as to what the GCMs "suggest" (984 F.2d at 563) do not form a sufficient basis for concluding that pension plans are to be treated as tax-exempt "labor organization[s]." See note 2, *supra*.

11 J. Tax'n 30 (1959). As the court of appeals stated, "exempting foreign plans means that their earnings will escape all U.S. taxation. Earnings of exempt domestic funds, by comparison, are taxed when benefits are paid to recipients." The *Morganbesser* court did not address the additional issues involved in cases, such as the present one, that concern a tax-exemption claim of a foreign pension fund.

b. In any event, the question presented in this case lacks prospective importance. The court emphasized in *Morganbesser* v. *United States*, 984 F.2d at 564, that, if it had interpreted the term "labor organization" with too broad a meaning, the Treasury could restrict that definition prospectively by regulation. In July 1997, the Treasury did just that by adopting 26 C.F.R. 1.501(c)(5)-1(b), with an effective date of December 21, 1995. 62 Fed. Reg. 40,447-40,449 (1997). The new regulation specifies that "[a]n organization is not an organization described in section 501(c)(5) if the principal activity of the organization is to receive, hold, invest, disburse, or otherwise manage funds associated with * * * pension or other retirement savings plans or programs." *Ibid.* The new regulation thus makes clear that a pension plan (such as petitioner) does not qualify as a "labor organization" under Section 501(c)(5). As the court of appeals pointed out in this case, due to the adoption of this new regulation, "*Morganbesser* had a brief life" (Pet. App. A10).

3. Petitioner argues in the alternative that, even though it does not qualify as a "labor organization," it should nonetheless be treated as one (Pet. 25-29). Petitioner contends that it would be an abuse of discretion for the Treasury to deny it exempt treatment because two British pension funds received exempt

treatment in private letter rulings that were subsequently revoked (Pet. 25-29). That contention plainly lacks merit.

As the court of appeals noted (Pet. App. A11), it is well established that a taxpayer cannot rely on a private letter ruling issued to another taxpayer.[4] The case that petitioner cites (*IBM Corp.* v. *United States*, 343 F.2d 914 (Ct. Cl. 1965)) is readily distinguishable from this consistent authority, for it was based solely upon the concern that "direct competitors" should receive equal treatment. The *IBM* court, and the other courts of appeals, have consistently limited that decision to that particular factual setting and to "the particular circumstances in that case." *Knetsch* v. *United States*, 348 F.2d 932, 940 n.14 (Ct. Cl. 1965), cert. denied, 383 U.S. 957 (1996). See also *Collins Music Co.* v. *United States*, 21 F.3d 1330, 1336 (4th Cir. 1994); *Wilson* v. *United States*, 588 F.2d 1168, 1172 (6th Cir. 1978); *Anderson Clayton Co.* v. *United States*, 562 F.2d 972, 981 (5th Cir. 1977); *Shakespeare Co.* v. *United States*, 389 F.2d 772, 773 (Ct. Cl. 1968); *Bornstein* v. *United States*, 345 F.2d 558, 564 n.2 (Ct. Cl. 1965). The circumstance involved in *IBM* is plainly not present here, for petitioner is not a competitor of the British pension funds.

Moreover, as the court of appeals emphasized, it is not correct that, "once the Service has treated one

---

[4] See, *e.g.*, 26 U.S.C. 6110(j)(3); 26 C.F.R. 601.201(l) and (m); *Educo, Inc.* v. *Alexander*, 557 F.2d 617, 619 (7th Cir. 1977); *Thrash* v. *O'Donnell*, 448 F.2d 886, 889 (5th Cir. 1971); *Shakespeare Co.* v. *United States*, 389 F.2d 772, 777 (Ct. Cl. 1968); *Minchin* v. *Commissioner*, 335 F.2d 30, 32-33 (2d Cir. 1964); *Weller* v. *Commissioner*, 270 F.2d 294, 298-299 (3d Cir. 1959), cert. denied, 364 U.S. 908 (1960); *Goodstein* v. *Commissioner*, 267 F.2d 127, 132 (1st Cir. 1959).

taxpayer a certain way, it must thereafter treat every similarly situated taxpayer exactly the same" (Pet. App. A11-A12). "[I]t is well established that the Commissioner [of Internal Revenue] may change an earlier interpretation of the law, even if such a change is made retroactive in effect. This rule applies even though a taxpayer may have relied to his detriment upon the Commissioner's prior position." *Dickman* v. *Commissioner*, 465 U.S. 330, 343 (1984) (citations omitted); *Dixon* v. *United States*, 381 U.S. 68, 72-75 (1965).

4. Finally, petitioner raises in this Court a new claim that was not presented in the proceedings below. Petitioner asserts here that, by not treating it as a tax-exempt labor organization after it incorrectly treated two British pension funds as tax-exempt, the Service has "violate[d] Article XI(3) of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Kingdom of the Netherlands" (Pet. 29). That claim, however, was not raised in the proceedings below and was not presented in the administrative claim for refund. It is therefore not properly before this Court.[5] See *United States* v. *Felt & Tarrant Mfg. Co.*,

---

[5] In a petition for rehearing and suggestion for rehearing en banc in the court of appeals (at 9-10), petitioner argued that "[t]he Panel decision erroneously suggests that a different 501(c)(5) standard may apply to foreign, as opposed to domestic entities" and stated that "a more burdensome standard could well violate income tax treaty obligations of the United States." This vague statement was not sufficient to raise a claim that any specific treaty had been violated. Moreover, a claim can not properly be raised for the first time in a petition for rehearing. *FDIC* v. *Massingill*, 30 F.3d 601, 605 (5th Cir. 1994);

283 U.S. 269, 272 (1931); *Sun Chemical Corp.* v. *United States*, 698 F.2d 1203, 1206 (Fed. Cir.), cert. denied, 464 U.S. 819 (1983). Cf. *Jimmy Swaggart Ministries* v. *Board of Equalization*, 493 U.S. 378, 397 (1990). "Only in exceptional cases will this Court review a question not raised in the court below." *Lawn* v. *United States*, 355 U.S. 339, 362 (1958); *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 61 n.10 (1996); *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 379 (1996); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 148 n.2 (1970). There are no exceptional circumstances present here to permit petitioner to raise its treaty claim for the first time in this Court.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

LORETTA C. ARGRETT
Assistant Attorney General

KENNETH L. GREENE
ROBERT W. METZLER
Attorneys

JUNE 1998

Costo v. *United States*, 922 F.2d 302, 303-304 (6th Cir. 1990); *United States* v. *Lewis*, 798 F.2d 1250 (9th Cir. 1986).

[6] In any event, petitioner's new treaty claim lacks merit. As petitioner concedes, the pension "plans of such entities as British Petroleum and Unilever" are currently litigating "the same [tax exemption] issue" that petitioner asks this Court to review (Pet. 6 n.5). It is thus evident that the United States is not discriminating in favor of British companies.

Supreme Court, U.S.
FILED
JUL 2 1998
OFFICE OF THE CLERK

(3)

No. 97-1734

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

STICHTING PENSIOENFONDS VOOR DE GEZONDHEID, GEESTELIJKE EN MAATSCHAPPELIJKE BELANGEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY TO BRIEF IN OPPOSITION

K. Peter Schmidt
Counsel of Record
Philip W. Horton
James P. Joseph
ARNOLD & PORTER
555 12th Street, N.W.
Washington, D.C. 20004
(202) 942-5000
Counsel for Petitioner

6 pp

The points made in opposition to the grant of certiorari in this case cannot be sustained.

I. *Morganbesser* Presents a Square and Irreconcilable Conflict.

The government erroneously asserts that the Second Circuit's contrary decision in *Morganbesser* v. *United States*, 984 F.2d 560 (1993), is distinguishable, "because that case involved a pension plan organized under United States law," and because tax-exempt treatment here would supposedly circumvent the "tax scheme that Congress specifically devised for pension plans in ERISA." Government Brief at 4, 8. There is no basis for this assertion of distinguishability. As noted in the Petition for a Writ of Certiorari ("Petition"), controlling and longstanding exemption authority specifically states that an entity's formation under foreign law is irrelevant to qualification for exemption, so long as the entity "meets the tests for exemption under that section." Petition at 24 (quoting Rev. Rul. 66-177, 1966-1 C.B. 132). Nor is any alleged inconsistency with ERISA relevant, since that statute specifically exempts plans like Petitioner from its substantive regulation.[1] If anything, Petitioner's specific exemption from ERISA regulation makes this a *stronger* case for exemption than *Morganbesser*.

---

[1] ERISA § 4(b)(4), 29 U.S.C. § 1003(b)(4), specifically provides as follows:

> The provisions of this title shall not apply to any employee benefit plan if such plan is maintained outside of the United States primarily for the benefit of persons substantially all of whom are nonresident aliens.

Also irrelevant is the fact that those receiving pensions from Petitioner are generally not subject to U.S. income taxation. It is the exempt status of the pension trusts themselves, not their beneficiaries, at issue in both this and the *Morganbesser* case. Moreover, there is nothing intrinsically or intuitively amiss when U.S. citizens and nonresident alien beneficiaries are taxed differently on distributions from an exempt trust. Congress surely did not intend to subject Dutch citizens to U.S. tax on pension benefits earned and paid to them in Holland.[2]

II. The Lower Court Approach Precludes Effective Judicial Review.

The lower court decision does, in fact, put IRS litigating positions in this area beyond judicial review. The Government Brief sets forth the following purported rebuttal: "If the plain language of the statute or (when relevant) its legislative history unambiguously demonstrates that a taxpayer is entitled to an exemption, the government's litigating position would not be immune from review." *Id.* at 7. While undoubtedly true, this proposition has no relevance here, where all parties concede that the statutory language

---

[2] The government also argues that a regulation finalized in 1995, which has no direct applicability here, in effect moots the conflict prospectively. Government Brief at 9. Even were this so (in proposed form, the regulation drew numerous comments questioning its legitimacy), the regulation, by its own terms, has prospective effect only. The continuing importance of the issue for prior years is illustrated by more than twenty pending cases in the Tax Court alone. *See* Petition at 6; *cf. Colony, Inc.* v. *Commissioner*, 357 U.S. 28, 32 (1958) (certiorari granted because the question "remains one of substantial importance in the administration of the income tax law for earlier taxable years"); *Watson v. Commissioner*, 345 U.S. 544, 548 (1953) (certiorari granted where legislation with prospective application resolved question at issue).

and legislative history unambiguously demonstrate little, if anything, regarding either the meaning of the term "labor organization," or the scope of the statutory exemption set forth. As noted in the Petition, the Revenue Rulings under section 501(c)(5) of the Internal Revenue Code ("Code") cover only a fraction of the entities generally considered to be exempt "labor organizations," omitting such obvious candidates as labor unions themselves, as well as labor union councils and federations like the AFL-CIO.

Thus, the statutory term "labor organization" is itself undefined, and largely unexplained, by the statute, regulations and legislative history. The sole remaining authority recognized by the lower court is the limited universe of Code section 501(c)(5) Revenue Rulings. In these circumstances, the "unambiguous entitlement" position of the lower court necessarily puts government Code section 501(c)(5) litigating positions beyond effective judicial review. The lower court's novel "unambiguous entitlement" approach should be rejected in favor of a straightforward construction of the category, *i.e.*, "labor organizations," to which Congress did unambiguously grant exemption.

III. *IBM* Is Directly In Point.

IBM Corp. v. *United States*, 343 F.2d 914 (Ct. Cl. 1965) is precisely in point. The government dismisses its applicability on the mistaken assertion that *IBM* "was based solely on the concern that 'direct competitors' should receive equal treatment." Government Brief at 10. This assertion was rejected in the *IBM* decision itself, where the court stated the following:

> It would weaken and dilute the standard of equality Congress put into [the grant of discretion under Code section 7805(b)] to add the gloss that, even though the [Internal

> Revenue] Service violated the statute, the taxpayer is without remedy unless he proves that he lost business or competitive position.

343 F.2d at 925. *IBM* applicability thus does not turn on Petitioner's having a competitive position *vis à vis* the British plans recognized as exempt by the IRS.

In reality, *IBM* provides a precise template for the facts of this case. For more than five years, the IRS treated the two British plans as tax exempt, while failing to act on Petitioner's pending application for recognition of exemption under Code section 501(c)(5). Petitioner has not attempted to rely on the determination letter of another taxpayer (*cf.* Government Brief at 10), but rather has actively and steadfastly pursued recognition of exempt status and equal treatment for itself. The denial of equal treatment represents an *IBM* violation of Code section 7805(b), and a violation of the spirit if not the letter of international treaty obligations.[3]

---

[3] Contrary to the government's assertions regarding Petitioner's treaty argument (Government Brief at 11), the notion of improper discrimination has been an element of Petitioner's case since Petitioner filed its claim for a refund. The treaty argument is also fairly included in Paragraph 28 of the complaint in which Petitioner alleges as a basis for its claim the IRS failure to accord equal treatment to similarly situated taxpayers. Moreover, by letter dated September 14, 1995, the government waived any "variance" objection, stipulating it would not argue that Petitioner was precluded from making or that a court was precluded from hearing any argument set forth in the complaint on grounds of "'variance' or any other doctrine." Such a waiver of the "variance" defense is perfectly proper. *See United States v. Felt & Tarrant Mfg. Co.* 283 U.S. 269, 273 (1931); *see also Goulding v. United States*, 929 F.2d 329, 332 (7th Cir. 1991). Upon review in this Court, Petitioner is not limited to the precise arguments made below but may make any argument in support of a properly presented federal claim. *Lebron v. National R.R. Passenger Co.*, 513 U.S. 374, 379 (1995); *Yee v. City of Escondido*, 503 U.S. 519, 536 (1992).

Based on the foregoing, and the points set forth in its Petition, Petitioner respectfully requests the grant of a writ of certiorari in this case.

Respectfully submitted,

K. Peter Schmidt
Counsel of Record
Philip W. Horton
James P. Joseph
ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000
Counsel for Petitioner